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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 475

ROBERT ELMER GALLEGOS, PETITIONER,

vs.

COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR CERTIORARI FILED MARCH 27, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 475

ROBERT ELMER GALLEGOS, PETITIONER,

VS.

COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19264

From the District Court of the City and County of Denver

H. Joe Rawlinson, Judge

PEOPLE OF THE STATE OF COLORADO, Plaintiff,

vs.

ROBERT ELMER GALLEGOS, EDWARD MARTINEZ, Defendants

PRAECIPE FOR WRIT OF ERROR—Filed October 30, 1959

To the Clerk of the Supreme Court:

Please issue Writ of Error to the Clerk of the District Court of the City and County of Denver on behalf of Robert Elmer Gallegos commanding him to certify a correct transcript of the record herein to the Supreme Court of Colorado pursuant to the rules of said Court. Also issue a summons to hear errors to the following named persons as defendant in error: People of the State of Colorado commanding the same to appear in the Supreme Court, pursuant to the rules of said Court.

Roger Cisneros, Charles S. Vigil, Attorneys for Plaintiff in Error.

[fol. 2] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19264

Error to the District Court of City & County of Denver

Hon. Joseph Rawlinson, Judge

ROBERT ELMER GALLEGOS, Plaintiff in Error,

vs.

PEOPLE OF THE STATE OF COLORADO, Defendant in Error

DESIGNATION OF PARTIES—Filed October 30, 1959

The parties to the within action will be designated as in the above caption.

Roger Cisneros, Charles S. Vigil, 711 E & C Bldg., Attorneys for Plaintiff in Error. Address: ——, ——, Telephone: Ch 4-0728.

[fol. 3] IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19264

WRIT OF ERROR—Filed November 3, 1959

The People of the State of Colorado to Clerk of the District Court of the City and County of Denver.

Greeting:

You are Hereby Commanded to certify, as provided by the rules of said Supreme Court, a correct transcript of the record in a certain cause lately pending in said Court between People of the State of Colorado, Plaintiff and Robert Elmer Gallegos and Edward Martinez, Defendants, to the Supreme Court in the City of Denver within sixty days from the receipt of this writ, or within such additional time as said Supreme Court may order.

Witness the Honorable Francis J. Knauss, Chief Justice of our Supreme Court, and the seal of said Court, in the City of Denver, this 30th day of October, A.D. 1959.

George A. Trout, Clerk, Supreme Court. By Evilyn J. Oliver, Deputy Clerk.

[fol. 3a] Received a copy of the foregoing writ of error this 2nd day of November, 1959.

David W. Oyler, Clerk of the District Court of the City & County of Denver. By Myrel M. McDonald, Deputy Clek.

[File endorsement omitted.]

[fols. 4-9] IN THE SUPERME COURT OF THE STATE OF COLORADO

No. 19264

ROBERT ELMER GALLEGOS, Plaintiff in Error,

vs.

PEOPLE OF THE STATE OF COLORADO, Defendant in Error

SUMMONS TO HEAR ERRORS—Filed October 30, 1959

To the Defendant in Error Above Named, Greeting:

You are hereby notified that a writ of error has been issued out of our Supreme Court, directed to the District Court of the City and County of Denver, in a certain cause lately pending therein between People of the State of Colorado, Plaintiff, and Robert Elmer Gallegos and Edward Martinez, Defendants to review the judgment of said Court, entered in said matter.

You are therefore hereby commanded to appear in the Supreme Court within ten days after service hereof and pay the docket fee of five dollars, and in default thereof the plaintiff in error will not be required to serve you with any

papers required by the rules of this Court, and the Court may proceed to a determination of said writ of error ex parte.

Witness the Honorable Francis J. Knauss, Chief Justice of our Supreme Court, and the seal thereof, affixed at my office in the city of Denver, this 30th day of October, A.D. 1959.

George A. Trout, Clerk, Supreme Court. By Evilyn J. Oliver, Deputy.

As attorney of record for the within named defendant in error, I hereby acknowledge service of the within summons to hear errors, this 30th day of October, 1959.

Duke W. Dunbar, Attorney General. Attorney for Defendant in Error.

[File endorsement omitted.]

[fol. 10] In the District Court in and for the City and County of Denver and State of Colorado

No. 45708 Div. 8

The People of the State of Colorado

vs.

Robert Elmer Gallegos and (Edward Raymond Martinez)

Order: Allowing District Attorney Leave to File Information; and Affidavit and that a Capias Issue—January 30, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and presents to the Court, in open session, the above entitled information, no preliminary examination having been had thereon, said information being accompanied by an affidavit as required by statute, and asks leave of the Court to file the same. And the Court having ex-

amined the said affidavit and information and being now sufficiently advised in the premises,

It is ordered by the Court that the District Attorney be, and he hereby is, granted leave to file said affidavit and information.

And leave of the Presiding Judge having been had the District Attorney doth file herein, in open Court, the said information and affidavit.

And thereupon, It is Ordered by the Court that a capias issue for the said defendant Robert Elmer Gallegos, returnable forthwith. And this is accordingly done.

[fol. 11] In District Court of Denver County

[Title omitted]

No. 45708 Div. 8

Order Holding Defendant Without Bail—January 30, 1959

At this day it is Ordered by the Court that the said defendant Robert Elmer Gallegos be held for trial herein, without bail. And this is accordingly done.

[fol. 12] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Attorney Enters Appearance—February 3, 1959

At this day comes Roger Cisneros, Esq., one of the attorneys of this Court and enters his appearance as attorney for and on behalf of Robert Elmer Gallegos the defendant herein.

In District Court of Denver County

The People of the State of Colorado

vs.

Robert Elmer Gallegos and (Edward Raymond Martinez)

Order of Continuance, Etc.—February 3, 1959

At this day on Motion of the defendant,

It is Ordered by the Court that this cause be continued to February 17, 1959 at 9:00 o'clock A. M. for Pleading and Setting.

Whereupon, counsel for the defendant withdraws a copy of the information herein filed against the said defendant, Robert Elmer Gallegos.

[fol. 13] In District Court of Denver County

Capias and Return

State of Colorado,
City and County of Denver, ss:

The People of the State of Colorado to the Manager of Safety and Excise, and ex-Officio Sheriff of the City and County of Denver, or to the Sheriff, Coroner, or Any Constable of Any County, Greeting:

We Command You, That you take the body of Robert Elmer Gallegos at Large, State Industrial School, Golden, Colo., if he shall be found in your County, and safely keep, so that he be and appear before the District Court of said City and County of Denver, forthwith to answer unto a certain Information preferred against him in said Court for the crime of Murder, and have you then and there this writ, with an endorsement thereon, as to the manner in which you shall have executed the same.

Witness, Davis W. Oyler, Clerk of said Court, and the seal thereof, at Denver, in said County, this 30th day of January, 1959.

David W. Oyler, Clerk. By ——— ———, Deputy Clerk.

[fols. 13a-15] Denver, Colorado, January 30, 1959.

STATE OF COLORADO,
City and County of Denver, ss:

I hereby certify that I have this day received the within named Robert Elmer Gallegos for confinement in the County Jail.

David Kieboch, Warden of the County Jail, by L. McPherson, Clerk.

[Endorsed:] No. —. Criminal Capias. District Court, City and County of Denver. The People of the State of Colorado, vs. Robert Elmer Gallegos. The Sheriff will hold the defendant to bail in the sum of —No Bail— Dollars, and — Cents. David W. Oyler, Clerk, by Myrel McDonald, Deputy Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

I have duly served the within by—Confined in County Jail as I was commanded. Edward O. Geer, Manager of Safety and Excise and Ex-Officio Sheriff, City and County of Denver, Colorado, by George Hays, Manager of Safety and Excise, and Ex-Officio Sheriff, —— ——, Deputy Sheriff.

Service, $2.00.
Mileage, $1.50.
Return, $3.50.

[fol. 16] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Criminal Action No. 45708 Div. 8

[Title omitted]

MOTION TO TRANSFER CASE TO THE JUVENILE COURT—Filed February 6, 1959

Come now the defendants above named by and through their Attorney Roger Cisneros and move as follows:

1. That the above entitled case be transferred from State District Court, City and County of Denver to the Juvenile Court, City and County of Denver.

2. That Juvenile Courts have concurrent Jurisdiction with the District Court in all Criminal cases involving minors under 21 years of age.

3. That the defendants are under the age of 21 years of age., Robert Elmer Gallegos being of the age of 14 years and Edward Raymond Martinez being of the age of 12 years.

4. That this is a proper case to be tried by the Juvenile Court in that the ends of Justice would better be served by the transfer.

Wherefore, Defendants ask that the proceedings be changed from the District Court, City and County of Denver, to the Juvenile Court, City and County of Denver.

Respectfully submitted, /s/ Roger Cisneros, Attorney for Defendants, 319 Symes Bldg., Denver, Colorado.

Received a copy of this foregoing Motion this 6th day of February 1959.

Melvin Rossman.

[fol. 17] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Attorney Enters Appearance—February 17, 1959

At this day comes Charles S. Vigil, Esq., one of the attorneys of this Court and enters his appearance as attorney for and on behalf or Robert Elmer Gallegos, the defendant.

In District Court of Denver County

[Title omitted]

Order Denying Motion to Transfer Case to Juvenile Court Denied—February 17, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant, Robert Elmer Gallegos, is brought into Court, and by his attorney, also comes.

Whereupon, this cause coming on for hearing upon the defendant's written motion to transfer this cause to the Juvenile Court; said motion is argued by counsel, and the Court being now sufficiently advised in the premises, doth deny said motion.

[fols. 18-19] In District Court of Denver County

No. 45708

[Title omitted]

Order of Continuance—February 17, 1959

At this day it is Ordered by the Court that this cause be continued to February 20, A. D. 1959 for Pleading, and Setting and Hearing on defendant's Petition to appoint psychiatrists to examine the defendant, Robert Elmer Gallegos. And this is accordingly done.

[fol. 20] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO

No. 45708

[Title omitted]

PETITION TO APPOINT PSYCHIATRISTS—Filed February 17, 1959

Come Now the attorneys for the above named defendants and move the Court to appoint psychiatrists to examine the above named defendants at the expense of the State for the reason that the aforesaid defendants are without funds and have no means whatsoever with which to retain psychiatrists, and neither do their families; and further, for the reason that the defendants are of such an age and in such apparent confusion that it would not be proper for a plea to be entered without first having an examination made by competent psychiatrists as to their mental condition, so as to advise counsel for the defendants as to their condition, and so that the psychiatrists who might be appointed could advise with counsel as to the condition of the two defendants, both of whom are so young as to create doubt as to their understanding.

Wherefore it is respectfully requested that the Court appoint psychiatrists to examine the two defendants herein and to consult with and advise counsel for the defendants, and to render reports to the Court as may be necessary.

Respectfully submitted, /s/ Charles S. Vigil, /s/ Roger Cisneros, Attorneys for Defendants, 711 Ernest & Cranmer Bldg., Denver, Colorado, Telephone: CHerry 4-0728.

[fol. 21] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order Granting Petition to Appoint Psychiatrists, etc.—February 20, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant, Robert Elmer Gallegos, is brought into Court and by his attorneys, also comes.

Whereupon, this cause coming on for hearing upon the written Petition of the defendant to appoint psychiatrists to examine the above-named defendant, Robert Elmer Gallegos.

Said Petition is argued by counsel and the Court being now sufficiently advised in the premises doth grant said Petition.

And thereupon, it is Ordered by the Court that Drs. C. Rymer, R. Cohen and L. V. Tepley be, and hereby are, appointed to examine said defendant.

In District Court of Denver County

[Title omitted]

Order of Continuance—February 20, 1959

At this day it is Ordered by the Court that above-entitled cause be continued to March 20, A.D. 1959 for the hospital report. And this is accordingly done.

[fol. 22] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order Appointing Doctor—March 12, 1959

At this day It Is Ordered by the Court that Dr. Chester Poremba be, and hereby is appointed to examine the defendant at Juvenile Hall.

[fols. 23-24] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order of Continuance—March 20, 1959

At this day It Is Ordered by the Court that this cause be, and hereby is, continued to April 15, A.D. 1959 for Hearing on Hospital Report.

[fols. 25-26] In District Court of Denver County

R. Robert Cohen, M.D.
Professional Arts Bldg.
1245 E. Colfax Ave.
Phone TAbor 5-8607
Denver 18, Colo.

Psychiatry Only. By Appointment

March 18, 1959.

Judge H. J. Rawlinson, Jr.,
City & County Bldg.,
Denver 2, Colorado.

Dear Judge Rawlinson,

In accordance with your request, I have psychiatrically examined Edward Martinez and Robert Gallegos at Juvenile Hall on March 7th and 14th, 1959.

I found that both boys are sane, mentally competent, fully capable of distinguishing between good and evil, and of adhering to the good.

Yours sincerely, R. Robert Cohen, M.D.

cc: Charles S. Vigil, Bert M. Keating.

RRC: rlc.

[fols. 27-28] In District Court of Denver County

Cherry 4-7615

Charles A. Rymer, M.D.
230 Majestic Building
Denver 2, Colo.

April 1, 1959.

Judge H. Joseph Rawlinson,
Judge of the District Court,
City and County Building,
Denver 2, Colorado.

Re: Robert Gallegos

Dear Judge Rawlinson:

Pursuant to your request. I have examined the above named at Juvenile Hall. I have seen Robert Gallegos on four occasions and wish to report to you the following as to his mental condition. It is my opinion that (1) Robert is sane at this time and was sane at the time of the commission of the alleged crime, and (2) that he is able to distinguish right from wrong at this time, as well as the time of the commission of the alleged crime.

With kindest personal regards, I remain

Very sincerely yours, Charles A. Rymer, M.D.

CAR: tp.

cc: Bert Keating, Charles Vigil.

[fols. 29-30] IN DISTRICT COURT OF DENVER COUNTY

L. V. Tepley, M.D.
804 Republic Building
Denver, Colorado

April 1, 1959.

The Honorable H. Joe Rawlinson, Jr.,
Judge of the District Court,
Denver, Colorado.

In Re: Robert Gallegos

Age: 14 years 11 months

DEAR JUDGE:

Pursuant to your order. I have made a neuropsychiatric examination of Robert Gallegos.

It is my opinion that this defendant is capable of distinguishing right from wrong, but is incapable of choosing the right and refraining from doing the wrong.

Right and wrong and the ability to do right and refrain from doing wrong is a moral entity. It is the result of mental and spiritual evolution of the human mind. Before the attribute of refraining from doing wrong becomes an integral part of the individual, many forces are at play. I shall only mention proper home environment, religious training, and adequate social guidance. The component of doing right and refraining from doing wrong grows in strength and becomes intertwined with the entire personality of the individual, thus becoming an integrated part of him. Robert Gallegos was deprived of many of those contributing forces to such an extent that he is inherently incapable of resisting an impulse to do wrong if led or encouraged by a more aggressive companion.

Respectfully yours, L. V. Tepley, M.D.

[fols. 31-32] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Criminal Action No. 45708

[Title omitted]

MOTION FOR SEVERANCE—Filed April 7, 1959

Come Now, the defendants, by counsel, and move the Court to grant a severance in the trial herein for the reason that evidence as to one defendant, because of his age as being under the age of 14 will necessarily differ from that of the other defendant herein.

Respectfully submitted, /s/ Charles S. Vigil, Attorney for Defendants. /s/ Roger Cisneros, Attorney for Defendants.

[fol. 33] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Criminal Action No. 45708

[Title omitted]

MOTION TO QUASH AND DISMISS INFORMATION—Filed April 7, 1959

Come Now the defendants, by Counsel, and move to quash and dismiss the information herein for the following reasons:

1. That the information is duplicative, in that both defendants are charged with doing the same act; and that the information does not contain facts sufficient upon which to sustain the charge contained therein.

Respectfully submitted, /s/ Charles S. Vigil Attorney for Defendants. /s/ Roger Cisneros, Attorney for Defendants.

[fol. 34] In District Court of Denver County

No. 45708 Div. 8

Order Denying Motion to Quash and Dismiss Information—April 14, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

Whereupon, this cause coming on for hearing upon the Written Motion of the defendant Robert Elmer Gallegos to Dismiss and Quash Information.

Said Motion is argued by counsel, and the Court being now sufficiently advised in the premises doth deny said motion.

In District Court of Denver County

[Title omitted]

Order to Hold Motion for Severance in Abeyance—April 14, 1959

At this day, it is Ordered by the Court that the defendant's Motion for Severance be held in abeyance. And this is accordingly done.

[fols. 35-36] In District Court of Denver County

[Title omitted]

Order of Continuance—April 14, 1959

At this day It is Ordered by the Court that Hearings on Defendant's Motions on former double jeopardy and proceedings in Juvenile Court be continued to April 28, 1959 at 9:00 o'clock A.M. And this is accordingly done.

In District Court of Denver County

[Title omitted]

Order Remanding Defendant—April 14, 1959

And thereupon, the said defendant Robert Elmer Gallegos is remanded to the custody of Juvenile Hall, City and County of Denver.

[fol. 37] [File endorsement omitted]

In the District Court in and for the City and County of Denver and State of Colorado

Criminal Action No. 45708

[Title omitted]

Plea of Former Jeopardy—Filed April 28, 1959

Come Now, the defendants, by counsel, and tender to the Court the following pleas:

1. Pleas of former jeopardy for the reason that the defendants, and each of them, have heretofore been tried and punished in another proceeding and that similar and the same evidence is to be used in the present action herein.

Wherefore, defendants pray that the Court abate and dismiss trial herein and that proper proceedings shall be had to establish the rights of defendants herein.

Respectfully submitted, /s/ Charles S. Vigil, Attorney for Defendants, 711 E. and C. Building, Denver 2, Colorado, CHerry 4-0728. /s/ Roger Cisneros, Attorney for Defendants.

[fol. 38] [File endorsement omitted]

IN DISTRICT COURT OF DENVER COUNTY

[Title omitted]

Hearing on Defendants' Plea of Former Jeopardy—April 28, 1959

Be It Remembered that heretofore and on, to-wit, the 28th day of April, A. D. 1959, the same being one of the regular juridical days of the April, 1959 Term of said Court, the above-entitled cause came on regularly for hearing on the defendants' plea of former jeopardy before the Honorable H. Joe Rawlinson, Jr., Judge of said Court presiding in Division 8 thereof, at which said time the following evidence was given and offered and proceedings had, to-wit:

APPEARANCES:

For the People: Bert M. Keating, Esq., District Attorney, By Melvin Rossman, Esq., Deputy, and Martin A. Kane, Esq., Deputy.

For the Defendants: Charles S. Vigil, Esq., and Roger Cisneros, Esq.

[fol. 39] (Discussion off the record.)

Mr. Vigil: We wish to call witnesses, your Honor.

The Court: Do you have your witnesses? They are detectives downstairs—do you want them?

Mr. Vigil: Yes, I would like to have them, your Honor.

The Court: This case comes up on the defendants' Plea of Former Jeopardy.

Mr. Vigil: In this matter, if the Court please, we would like to call witnesses to establish our plea, and at this time we would like to call Minnie Brady, the Clerk in charge of the records of the Juvenile Court.

Minnie M. Brady, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?
A. Minnie M. Brady.
Q. Where do you live?
A. 762 South Raritan.
Q. Where do you work?
A. In the Juvenile Court.
Q. What is your title there?
A. I am a file clerk and I am also deputized.
Q. Do you know these two boys who sit here in the courtroom (indicating)?
A. No, I don't know them.
Q. Have they been in your court before?
A. If they have, I didn't see them.
Q. Do you have a file for Robert Gallegos and Edward [fol. 46] Martinez in your records.
A. Yes, I do.
Q. Do you have that file with you?
A. Yes, I have them both.
Q. And does this file contain all of the records on Robert Gallegos and Edward Martinez?
A. Well, yes, that is the minute orders.

Mr. Vigil: I would like to have these files marked.
The Court: I don't think that is necessary.
Those are the official files of the Juvenile Court?
The Witness: Yes, your Honor.

Q. You have Action No. 25781 for Robert Elmer Gallegos?
A. Yes.
Q. And you have Action No. 25774 for Edward Raymond Martinez, is that correct?
A. Yes, that is correct.

Mr. Vigil: We now offer these records into evidence.
Mr. Kane: For what purpose?
Mr. Vigil: For the purpose of establishing part of the proof against these two defendants.
Mr. Kane: We have no objection.

The Court: The files will be admitted.

Mr. Kane: We have no questions.

(Witness excused.)

Mr. Vigil: At this time I will call Judge Philip B. Gilliam.

PHILIP B. GILLIAM, called as a witness by the defendants, having been first duly sworn, on oath, testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?

A. Philip B. Gilliam.

[fol. 41] Q. And what is your official position?

A. I am Judge of the Juvenile Court of the City and County of Denver.

Q. And what does your court handle, what type of matters?

A. I handle children charged with juvenile deliquency under the age of eighteen years, also adoptions, delinquency, dependency and nonsupport actions.

Q. How long have you been so acting, Judge?

A. In this particular position, eighteen years.

Q. And did you handle a matter involving Robert Gallegos and Edward Martinez?

A. Yes, I did.

Q. And we have before the Court here two files concerning this matter; I would like to have you look at those and those two complaints there concerning these two boys—by the way, the two boys named in these complaints, or informations, in your court, are those the same two boys who sit in this courtroom now?

A. Yes, they are. I know them very well.

Q. Can you point them out?

A. This is Martinez, and Gallegos in the rear (indicating).

Q. With reference to the charges that were made in your court, what were those charges? Were those charges of juvenile delinquency?

A. They were charges of juvenile delinquency pertaining to assault and robbery.

Q. When did that occur?

A. The offense occurred December 19, 1958 on a Friday.

Q. Did you have a statement that was submitted as [fol. 42] proof in your court?

A. I don't have it with me, but the police officer testified from that statement, Mr. Chism.

Q. Was the statement admitted in evidence before you?

A. I believe it was.

Q. Who was the witness?

A. Police Officer Chism.

Q. Regularly, does the district attorney prosecute those matters that appear in your court?

A. They do if we call them in; oridinarily it is an admission of guilt.

Q. Under the statutes of Colorado, isn't it a fact the district attorney should attend to those matters if you desire his presence?

A. Yes.

Q. In this case were there other witnesses in addition to Mr. Chism?

A. The probation officer at Juvenile Hall, Leo Gemma, does a pre-sentence investigation and they testify as to their findings.

Q. Relative to the testimony of Police Officer Chism, what was his testimony?

A. He testified from his complaint. I have that complaint with me, incidentally. There were two different complaints went to the court. The first, the original complaint on Robert Elmer Gallegos, and then the additional complaint because of a change in story. The same is true in regard to Edward Raymond Martinez, two different complaints.

Q. Are these part of your records?

[fol. 43] A. Yes, that is the report sent by the police department on the allegations of what the police department found and they make up the petition from those reports. They come from the Juvenile Bureau's office of the Police Department.

(Thereupon, Defendants' Exhibits 1, 2, 3, and 4 were marked for identification.)

Q. Judge, I hand you what has been marked Defendants' Exhibits 1, 2, 3, and 4. Can you state what those are?

A. These are the complaints sent from the police department to the Juvenile Court outlining the charges they were bringing against these two boys and from these complaints we make up the official petition concerning delinquency.

Q. And do those complaints contain statements made by the boys?

A. Yes.

Q. And were those statements copied from the statements made to the police officer?

A. I presume so.

Q. And are those part of the records in your court?

A. Yes, they are.

Q. And you keep them in your court, custody and control?

A. Yes.

OFFERS IN EVIDENCE

Mr. Vigil: We offer exhibits 1, 2, 3, and 4m in evidence.

Mr. Kane: Your Honor, we object for the reason the officers are present in court and can testify.

(Question by Mr. Kane) I believe your Honor only has knowledge of what the officers submitted and it is [fol. 44] strictly hearsay. Is that correct?

The Witness: Yes, sir.

Mr. Kane: These were made by other parties?

The Witness: Yes, they are.

The Court: I think since they made them they better testify.

Q. With reference to the statements made by Police Officer Chism, what was the substance of those statements?

A. The complaints came up on two different charges. Two men were assaulted, there were two victims, one was a man eighty-three years old by the name of Kruhd; the other was a man by the name of Smith. He was seventy-nine years old. In these cases the testimony by the police officer was to the effect that Robert Gallegos and Edward Martinez followed Kruhd to his room for the purpose of robbing Mr. Kruhd; he had some groceries in his hand; they assaulted him, struck him, injured him, and took money from him. Later on they had the same idea. There

were three of them, Robert Gallegos, his brother eight years of age, Richard, and Eddie Martinez, and they decided to follow a man by the name of Smith who was seventy-nine years of age; they noticed he was kind of weaving on the street and either ill or possibly had been drinking, but there is a question about that. He went up to his rooming house; they lost track of him temporarily; they wanted to get his money apparently, and they knocked on some neighbor's door and said that they were looking for this particular man. As a matter of fact they said he [fol. 45] was their uncle, I believe. The neighbor told these boys where they could find him; they went into the room, and the first story was that Eddie Martinez was not present in the room—the little redhaired boy here (indicating), but that Richard was present along with his brother, Robert, and they assaulted the old man. As I understand it, they later changed their story and they said that Eddie was present and Robert was present, and Richard was downstairs and had nothing to do with it except possibly as a lookout. The testimony, as I heard it at that time, was that Eddie Martinez, the smaller boy, grabbed the old man as he went to get a drink of water and Robert Gallegos struck him across the chin with a shoe shine brush, that they took $13.00 from the man. This happened on December 19, 1958.

Later the police started to make their investigation and they apprehended these two boys. The old man, I understand, went to the hospital and he was doing very well and they expected him to recover. Later he had a stroke, I understand, in the hospital and went into a relapse.

I heard the case on January 15, 1959, and the old man, Mr. Smith, was alive at the hospital at that time.

Q. Who represented these two boys at this time?

A. There was no representation.

Q. And as a result of your hearing what did you do?

A. I committed them to the State Industrial School at Golden, Colorado, for an indeterminate period of time.

Q. And customarily on commitments do you have continuing jurisdiction?

A. No. After we commit, it is up to the superintendent [fol. 46] at the Industrial School as to time.

Q. But so far as the offense was concerned, it covered all the factors you have outlined?

A. Yes.

Q. And how long can they be held there?

A. They can hold them in the State Industrial School until they are eighteen, I understand, under the law.

Cross-examination.

By Mr. Kane:

Q. I understand the hearing was held January 16, 1959, is that correct?

A. Yes.

Q. In your court?

A. Yes.

Q. And upon the charge of assault to rob?

Mr. Vigil: Wasn't that a juvenile delinquency charge?

The Witness: It was a juvenile delinquency as to the violation of a state law.

Q. Is that simply a kind of charge similar to vagrancy which is not one charged like assault, but they are tried as to the facts of that case? It is more or less a grouping together, is that true?

A. It could be, yes. The law states any violations of state or city law.

Q. Was this charge heard on the charge of murder?

A. The man was still alive, it was assault to injure.

Q. There could not have been a charge of murder because the murder had not been fully completed. Is that true? [fol. 47] A. That is my opinion, yes.

Q. And there was no charge of murder?

A. No. I think the element of murder has to involve a death, of course.

Redirect examination.

By Mr. Vigil:

Q. With reference to the facts, however, murder or any charge may constitute juvenile delinquency, is that true?

A. It could be.

Q. And so juvenile delinquency, so far as your court is concerned, you do have charge of juvenile delinquency regardless?

A. Yes, it would have included murder if the man had died; it certainly would have included any violation of a state or city law.

Recross-examination.

By Mr. Kane:

Q. The set of facts that would be murder did not exist on January 5, 1959?

A. No.

Q. So it would have been impossible for that crime to come before your court at that time, is that correct?

A. Yes, sir.

(Witness excused.)

[fol. 48] Paul O. Chism, called as a witness by defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?

A. Paul O. Chism.

Q. Where do you live, Mr. Chism?

A. 1110 Quok Street, Denver, Colorado.

Q. What is your work?

A. Police officer, City and County of Denver.

Q. How long have you so acted?

A. Eleven years.

Q. Are you assigned to some particular duties?

A. I am doing detective work out of the Juvenile Bureau.

Q. Did you investigate a matter which involved these two boys who are before the Court?

Mr. Kane: I object to any testimony as to the facts developed by the Officer. This is a hearing on a motion of former jeopardy. This is becoming a discovery procedure.

(Argument of counsel.)

Mr. Vigil: This is a matter being heard by the district court and no matter what the Juvenile Officer said wouldn't make the matter so. We are attempting to show the statements and permission was granted to call the police officer and the statements are in the presence of the court.

The Court: Objection overruled.

Q. Did you make some investigation concerning Robert [fol. 49] Gallegos and Edward Martinez?

A. I did, sir.

Q. When did you do that?

A. The investigation began January 1, 1959 upon the arrest of Robert Gallegos.

Q. And when did you complete your investigation?

Mr. Kane: I object, your Honor. I think the only thing that is admissible is what was testified to at the hearing. It has nothing to do with the investigation.

The Court: What he is getting at are the exhibits 1, 2, 3, and 4.

(Argument of counsel.)

The Court: I will permit him to answer the question.

Q. When did your investigation conclude?

A. That I couldn't say, except the fact I made a report to Juvenile Court and also wrote the report at the time of the hearing in Juvenile Court.

Q. May I ask you to refer to Defendants' Exhibits 1, 2, 3, and 4? (Exhibits handed to witness.)

A. These are the reports made by me to the Juvenile Court.

Q. Now, these reports were sent by you, or brought by you to the Juvenile Court. Is that correct?

A. No, sir, we have a procedure more or less in the Juvenile Bureau where we have original notes the clerk types them up and then sends them up to the Juvenile Court.

Mr. Vigil: We now offer into evidence Defendants' Exhibist 1, 2, 3, and 4.

Mr. Kane: I would like to ask a question, your Honor.

The Court: All right, you may.

[fol. 50] Mr. Kane: Officer, directing your attention to the reports I have placed before you, do those reports contain anything as to the charge of murder?

The Witness: No, sir.

Mr. Kane: If the Court please, we have no objection.

The Court: Defendants' Exhibits 1, 2, 3, and 4 will be admitted into evidence.

Q. Now, the charge in the district court, as filed here by Charles W. Miller, has your name endorsed on it as a witness. Is that charge based on these same statements?

A. In a way, yes, sir, but in another way it is the actual facts as to what has happened.

Q. The fact of the matter is that you would testify from your same statements as given to the Juvenile Court. Is that correct?

A. Except for the fact Mr. Smith died.

Q. But everything else would be the same. Isn't that true?

A. Yes.

Q. All references to these statements made by these boys would be the same?

A. Yes.

Q. In other words, you would not change the statements in any way, would you?

A. No, sir.

Q. And you have no additional information you would add to it, would you?

A. Except the fact Mr. Smith died.

Q. Now, in your investigation, according to Judge Gil-
[fol. 51] liam's testimony, there were actually two statements made?

A. Two separate reports, yes, sir.

Q. As I understand, they first made one statement and then changed it.

A. I understand you now. Yes, sir, that is correct.

Q. Had this eight year old boy, Richard Gallegos, made a statement?

Mr. Kane: Your Honor, I object to that. That has nothing to do with the motion for double jeopardy.

The Court: Objection sustained.

Q. These statements, were they based on statements made by Richard Gallegos?

A. Partially, yes, sir.

Q. What other police officers were present——

The Court: The statements are in evidence, so you do not have to qualify them further.

Mr. Vigil: I think that is all.

Cross-examination.

By Mr. Kane:

Q. Directing your attention to the 16th day of January, 1959, would it have been possible for you to have filed a murder charge on that date?

A. No, sir.

Q. Why not?

A. Mr. Smith was still alive.

Mr. Kane: No further questions.

(Witness excused.)

[fol. 52] CHARLES W. MILLER, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you please state your name?

A. Charles W. Miller.

Q. Where do you live?

A. 7081 Wolff Street, Westminster.

Q. What is your work?

A. Sergeant, Police Department.

Q. Are you assigned to some particular phase of police work?

A. I am Sergeant of the Juvenile Bureau.

Q. Are you familiar with the charge against these two boys, Robert Gallegos and Edward Martinez, filed in the Juvenile Court?

A. I reviewed Mr. Chism's filing, yes, sir.
Q. And did you participate in any of this directly?
A. Not directly, only in a supervisory capacity.
Q. So you actually know nothing about this of your own knowledge?
A. I do not.

Mr. Vigil: That is all.
Mr. Kane: No questions.

(Witness excused.)

[fol. 53] JOSEPH S. RIGGS, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Mr. Kane: Your Honor, I object to any more questions on these statements. If his testimony would be the same, he is evidently using this solely as a discovery procedure.
The Court: I don't know what he is going to ask as yet.

(Argument of counsel.)

Q. Will you please state your name?
A. Joseph S. Riggs.
Q. What is your address?
A. 3670 Holly.
Q. Are you familiar with this charge against Robert Gallegos and Edward Martinez?
A. In this respect; I didn't have actually very much to do with this particular situation other than to accompany Detective Chism on one official investigation prior to the pick-up of the suspects.
Q. Then you didn't have anything to do with the statements that are before the Court?
A. No, sir.

Mr. Vigil: That is all.
Mr. Kane: No questions.

(Witness excused.)

[fol. 54] K. Wayne Weston, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?
A. K. Wayne Weston.
Q. Where do you live, Mr. Weston?
A. 5173 West Columbia Place.
Q. What is your work?
A. I am a patrolman, City and County of Denver.
Q. Are you familiar with the charge against Robert Gallegos and Edward Martinez as made in the Juvenile Court?
A. Well, I am familiar with it to the respect that I was the officer that made one of the offense reports.
Q. Did you participate in the questioning and preparation of the reports before the Court?
A. No, I did not.
Q. That is all you know about this, that you made one of the reports. Is that right?
A. That is right.

Mr. Vigil: That is all.
Mr. Kane: No questions.

Harvey J. Holland, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

[fol. 55] Direct examination.

By Mr. Vigil:

Q. State your name, please?
A. Harvey J. Holland.
Q. Where do you live, Mr. Holland?
A. 3405 West Exposition.
Q. What is your work?
A. Patrolman, City and County of Denver.
Q. How long have you been so acting?

A. About six years.

Q. Are you assigned to some particular duties as a patrolman.

A. Yes.

Q. What is that assignment?

A. At that time I was working Car 11 with Officer Weston.

Q. Are you familiar with the charge against Robert Gallegos and Edward Martinez made the Juvenile Court?

A. Just with the original report made on one of the victims, Mr. Smith.

Q. You made that complaint, did you?

A. Yes.

Q. That is all you know concerning this matter?

A. Yes.

Mr. Vigil: That is all.

Mr. Kane: No questions.

Mr. Vigil: If the Court please, that concludes the witnesses.

The Court: Mr. Kane, do you have any witnesses?

[fol. 56] Mr. Kane: No, your Honor, we have no witnesses.

STATEMENT ON BEHALF OF DEFENDANTS BY MR. VIGIL

Mr. Vigil: May it please the Court, in this matter, our contention is that these two boys Robert Gallegos and Edward Martinez were originally charged and tried in the Juvenile Court upon the same statement of facts and the same offense upon which the murder charge that the district attorney has filed in the district court is concerned, and, of course, the fact of the matter is that the district court has the control of the offense as filed in the Juvenile Court, as there seems to be no doubt there is concurrent jurisdiction in the two courts.

The charge made in the Juvenile Court is a delinquent charge and that can cover any offense. The fact that some different offense could have been made out of this delinquency charge could have been made as a result of the offense.

Any violation of the state law could have covered that delinquency offense and so, of course, it makes no difference what the offense might have been, juvenile delinquency covers every offense, including murder. And so the same

statement of facts has already been tried in the Juvenile Court and these boys have been punished by sending them to the Industrial School, where they were at the time this offense was charged.

The whole purpose of this is clear that the purpose of the juvenile law is to prevent anyone from growing up and leading an idle and useless life. This has been passed on in California, 245 Pac. 409; and 43 N. Y. Sup. 361, which states approximately the same thing.
[fol. 57] The Colorado court in Linsley v. The People states approximately the same, 66 Colo. 343.

Now, there is no question that proceedings in the Juvenile Court are conducted by the district attorney as provided in Section 56, Chapter 33, and, I am sure, we all agree that the juvenile courts have jurisdiction. The fact of the matter is we have these two boys being tried on two different offenses on the same set of facts. The district attorney, whether he appeared in the juvenile court or not, is in charge of the prosecution in the juvenile court and so selected the jurisdiction of the juvenile court to proceed, it was tried there and the facts presented as the evidence here shows. The only difference is, if we could assume any different facts, that something else was discovered after they were convicted, which might have been a possible robbery charge and then under the law they could have been charged in the district court under the same set of facts.

The situation here is that we must assume that these boys can only be tried once on the same set of facts, or they could be tried over and over again based on the assumption that something came forward and we would be permitting the district attorney to decide when he is going to try them more than once, having selected the juvenile court.

I think the court knows at the time the charge was made, and as the evidence shows, that apparently this man upon whom the original charge was based—that is the complaining witness—that he was in the hospital and if the district attorney had felt he should, he could wait to see what facts would develop. But they proceeded in the juvenile court [fol. 58] and the result was that the boys were punished as the law provides, and since the state elected to proceed

in the juvenile court the juvenile court acted and the judgment in this matter must proceed just as it has, based upon that statement.

The case of People vs. Morley, 77 Colo. 25, defines the delinquent child, and it says:

> "The words 'delinquent child' shall include any child eighteen years of age or under such age who violates any law of this state."

And, of course, the same case is the case that decides or that makes the form of proceeding against such delinquent child optional, but it does not say the state can proceed in the juvenile court and later, if something develops, file another charge against the delinquent, and I am sure no court will allow that to happen in spite of the fact there might be some later factor to make the situation seem different to the district attorney.

The same case provides:

> "In cases where jurisdiction of the subject matter is concurrent, that court which first acquires jurisdiction over the case controls it."

And, of course, the situation here is, in our opinion, exactly that situation. The district attorney knew, or had a statement to the effect that this offense had occurred which led to the filing of the charges in the juvenile court and the district attorney selected the juvenile court and proceeded and the boys were then sentenced under that particular court's order and committed. So, of course, the [fol. 59] trial was held there and that court had jurisdiction over the offense. I don't think there is any dispute about that; so, it is our contention that the district attorney based it upon the same statement of facts. The only evidence they now contend has been changed is that the old man, who was assaulted, and in accordance with the statement, has since died and, therefore, they are going to charge them in the district court based on the same facts. If they had felt they should wait until something developed about the old man's condition, they should have waited until this occurred and have the matter determined.

(Further argument of counsel and citation of authorities.)

Mr. Kane: May it please the Court, the only point in this matter is the fact situation, as to the facts in the first case being exactly the same as the second case. Mr. Vigil said the district attorney would present the same evidence. It would be highly unusual to try these boys on the 16th of January and convict them of murder. It was not until January 26th that the victim died.

(Citing authorities.)

It is impossible to charge murder while the victim is still alive. The test in Colorado is did the party die within one year after the commission of the offense and if he did a murder charge can be brought regardless of any other charges brought out of that situation. The facts are so changed by the death of the victim that jeopardy does not ensue.

(Further arguments and citation of authorities.)

[fol. 60] STATEMENT BY THE COURT AND DENIAL OF MOTION

The Court: The Information filed by the District Attorney, No. 45708, charges that "Robert Elmer Gallegos and Edward Raymond Martinez did feloniously, wilfully and of their premeditated malice aforethought kill and murder one Robert F. Smith; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Colorado." The charges filed in the Juvenile Court against Robert Elmer Gallegos and Edward Raymond Martinez are on the usual Juvenile Court form which is a petition by the People of the State of Colorado and is called a Delinquency Petition.

The Juvenile Court, after hearing the evidence as testified to by Judge Gilliam, found the defendants to be delinquent children and sentenced them to the Industrial School.

Judge Gilliam also testified, of course, that at the time of his commitment he did not consider any charge of murder because Mr. Smith was alive. That never came before the Court previously.

The law on the matter, as this Court sees it, is, first let us assume these are adults and let us assume they

had been filed on in the district court; and assume I had tried them on the charge of armed robbery and they were found guilty, and assume they were sentenced to the State Penitentiary, and two months later the victim died. Under our law, if the victim dies within a year and a day they could be charged with murder, and that is the Colorado law. I think even it is fair to suppose if there were a criminal charge of robbery and Smith died, [fol. 61] within a year and a day, they could have been brought back and tried for murder. But you do not have that situation here. In the case in the Juvenile Court in the matter of the People vs. Robert Elmer Gallegos and Edward Raymond Martinez, there is no finding that they committed a criminal offense; they were only found to be delinquent children. That is to protect the children because of their age. The District Attorney apparently was willing to have them tried as juvenile delinquents. That is why we have the Juvenile Court. That does not apply to murder. There would be no double jeopardy, there could not be because the fact of murder did not exist and and we have Judge Gilliam's testimony that he did not even consider that because he, Smith, was alive.

The motion will be denied.

Mr. Vigil: Please note our exceptions.

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7 [fol. 62] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order Denying Plea of Former Jeopardy—April 28, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

Whereupon, the said defendant, by his attorneys, tenders his Plea of Former Jeopardy.

Said Plea is argued and the Court being now sufficiently advised in the premises, doth deny said Plea.

In District Court of Denver County

[Title omitted]

Defendant Arraigned Pleads Not Guilty—April 28, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court, and by his attorneys, also comes.

Whereupon, the said defendant is arraigned, hears the reading of the information herein and being required to plead thereto, answers and saith that he is not guilty, in [fols. 63-64] manner and form as in and by this said information he stands charged. And of this he puts himself upon the Country, and the District Attorney doth the like.

In District Court of Denver County

[Title omitted]

Order of Continuance and Remanding Defendant—April 28, 1959

At this day it is Ordered by the Court, upon the motion of the District Attorney, that this cause be set for trial June 8, 1959 at 10:00 o'clock A.M. And this is accordingly done.

And thereupon, the said defendant Robert Elmer Gallegos is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 65] [File endorsement omitted]

IN THE DISTRICT COURT IN THE CITY AND COUNTY OF DENVER, STATE OF COLORADO

No. 45708 Division 8

[Title omitted]

MOTION TO WAIVE A JURY—Filed May 4, 1959

Come now the defendants above named by counsel and move this Honorable Court to waive a jury in the above entitled case as by law provided, since it appears that this case does not involve any of the provisions of the law requiring consideration of the death penalty, and the defendants herein may therefore waive a jury.

Respectfully submitted, /s/ Charles S. Vigil. /s/ Roger Cisneros, Attorneys for Defendants.

[fols. 66-67] IN DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

[Title omitted]

ORDER DENYING MOTION TO WAIVE JURY—May 15, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court, and by his attorneys, also comes.

Whereupon, this cause coming on for hearing upon the defendant's written Motion Waiving Jury.

Said motion is argued by counsel to conclusion and the Court being now sufficiently advised in the premises, doth deny said motion.

And thereupon, the said defendant Robert Elmer Gallegos, is remanded to the custody of the authorities at Juvenile Hall, City and County of Denver, State of Colorado.

[fols. 68-69] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

No. 45708

[Title omitted]

NOTICE OF HEARING—Filed May 29, 1959

To: The District Attorney of the City and County of Denver, Colorado.

This is to notify you that the Motion for Preliminary Hearing and the Motion for a Jury List on the above-entitled case will be heard before the Honorable H. Joe Rawlinson, Jr., Judge of the District Court of the City and County of Denver, on Tuesday, the 2nd day of June, 1959, at 9:00 o'clock A.M., or as soon thereafter as counsel may be heard.

s Charles S. Vigil, s Roger Cisneros, Attorneys for Defendants.

Proof of service (omitted in printing)

[fols. 70-71] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

No. 45708

[Title omitted]

MOTION FOR PRELIMINARY HEARING—Filed May 29, 1959

Denied—June 1959—H.J.R., Jr.

Come now the defendants, by counsel, and move the Court to order the prosecution herein to grant a preliminary hearing in the above-entitled matter as by law provided, and as grounds therefor state that under the laws of the State of Colorado that the defendants are entitled to a preliminary hearing; that they have not been accorded this right and that this is important to determine whether or not the facts herein justify a trial herein.

Respectfully submitted, /s/ Charles S. Vigil. /s/ Roger Cisneros, Attorneys for Defendants.

[fol. 72] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

No. 45708

[Title omitted]

MOTION FOR A JURY LIST—Filed May 29, 1959

Granted—June , 1959—H.J.R., Jr.

Come now the defendants above-named, by counsel, and move the Court to order the prosecution herein to provide a jury list immediately to the defendants herein, for the reason that the jury list must be made available in sufficient

time so that the defendants may have an opportunity of using the jury list for the purpose which the law provides.

Respectfully submitted, /s/ Charles S. Vigil. /s/ Roger Cisneros, Attorneys for Defendants.

[fol. 73] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order Granting Motion for Preliminary Hearing, etc.—June 2, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

Whereupon, this cause coming on for hearing upon the written Motion for Preliminary Hearing.

Said motion is argued by counsel to conclusion and the Court being now sufficiently advised in the premises, doth grant said motion.

It is further Ordered by the Court that *that* the Preliminary Hearing is to be heard before the trial Hearing on Motion for Jury List.

In District Court of Denver County

[Title omitted]

Order Granting Motion for Jury List—June 2, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys also comes.

Whereupon, this cause coming on for hearing upon the written Motion for a Jury List.

Said motion is argued by counsel, and the Court being [fols. 74-75] now fully advised in the premises, doth grant said motion.

And thereupon, the said defendant Robert Elmer Gallegos is remanded to the custody of the authorities at Juvenile Hall, City and County of Denver, State of Colorado.

IN DISTRICT COURT OF DENVER COUNTY

[Title omitted]

ORDER VACATING AND RESETTING TRIAL DATE—June 2, 1959

At this day It Is Ordered by the Court that the trial date of June 8, A. D. 1959 be, and hereby is, vacated.

It Is Further Ordered by the Court that trial date in this cause be, and hereby is set for June 9, A. D. 1959, at 10:00 o'clock A. M.

[fol. 76] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Criminal Action No. 45708

[Title omitted]

PETITION TO HAVE COURT APPOINT DOCTOR—Filed June 5, 1959

Come Now the defendants, by counsel, and allege as follows:

1. That a Paupers Oath has been filed by defendants parents in the above case.

2. That it will be necessary to have a doctor present during the trial of the above two defendants.

3. That the defendants do not have the necessary funds to pay for a doctor.

Wherefore, defendants pray that the court appoint a doctor at state expense to be used during this trial.

Respectfully submitted, /s/ Charles S. Vigil, Attorney for Defendants. /s/ Roger Cisneros, Attorney for Defendants.

[fol. 77] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order Vacating Original Order for Preliminary Hearing and Denying Written Motion for Preliminary Hearing —June 9, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court, and by his attorney, also comes.

Whereupon, It Is Ordered by the Court that the original order for a Preliminary Hearing be, and hereby is, vacated, and held for naught.

It Is Further Ordered by the Court that defendant Robert Elmer Gallegos' written Motion for a Preliminary Hearing is denied.

In District Court of Denver County

[Title omitted]

Order Denying Petition to Have Court Appoint a Doctor, etc.—June 9, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant is brought into Court, and by his attorney, also comes.

Whereupon, this cause coming for hearing upon De-

fendant's written Petition for a Court-appointed doctor [fol. 78] to be used during the trial.

Said motion is argued by counsel, and the Court being now sufficiently advised in the premises, doth deny said motion.

IN DISTRICT COURT OF DENVER COUNTY

[Title omitted]

SELECTION OF JURY, ETC.—June 9, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant, Robert Elmer Gallegos, is brought into Court and by his attorney, also comes.

Whereupon, comes the selection of a jury to the hour of adjournment.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard, nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the Court not to allow said jurors to separate, nor converse, or hold intercourse with any others.

And thereupon, it is Ordered by the Court that the trial of this cause be continued to the 10th day of June, A. D. 1959, at 10:00 o'clock A. M., and that all witnesses heretofore subpoenaed in this cause be excused to the 10th day [fol. 79] of June, A. D. 1959 at 10:00 o'clock A. M., to come again at that date without being re-subpoenaed so to do.

Whereupon, the said defendant Robert Elmer Gallegos is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 80] IN DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

[Title omitted]

TRIAL RESUMED, ETC.—June 10, 1959

At this day comes again Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorney, also comes.

Whereupon, comes the selection of a jury to the hour of adjournment.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard, nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the Court not to allow said jurors to separate, nor converse, or hold intercourse with any others.

And thereupon, it is ordered by the Court that the trial of this cause be continued to the 11th day of June, A.D. 1959, at 10:00 o'clock A.M., and that all witness heretofore subpoenaed in this cause be excused to the 11th day of June, A.D. 1959 at 10:00 o'clock A.M., to come again at that date without being re-subpoenaed so to do.

[fol. 81] Whereupon, the said defendant Robert Elmer Gallegos is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 82] IN DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

[Title omitted]

TRIAL RESUMED, INSTRUCTIONS TO JURY, ETC.—June 11, 1959

At this day comes again Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant, Robert Elmer Gallegos, is brought into Court, and by his attorney, also comes.

Whereupon, comes a jury, to-wit: Mrs. Mary P. Atzenbeck, Louis M. Bender, Mrs. Norma L. Chamberlain, Wilburn E. Collins, Mrs. Dorothy C. Craft, Benjamin F. Dickerson, Mrs. Marian W. Grady, Mrs. Catherine L. Kinnamon, Miss Dorothy I. Koenig, Mrs. Mary Morris, James A. Newman, Chris Schmutzler, Mrs. Myra P. Todd, thirteen good and lawful men and women. And they are duly selected and tried, impaneled and sworn to well and truly try and true deliverance make between the People of the State of Colorado and Robert Elmer Gallegos, the defendant herein, and a true verdict give according to the law and the evidence.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard, [fol. 83] nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the Court not to allow said jurors to separate, nor converse, or hold intercourse with any others.

And thereupon, it is ordered by the Court that the trial of this cause be continued to the 12th day of June, A.D. 1959 at 10:00 o'clock A.M.

It is Further Ordered by the Court that all witnesses heretofore subpoenaed in this cause be excused to the 12th day of June, A.D. 1959, at 10:00 o'clock A.M., to come again that date without being resubpoenaed so to do.

Whereupon, the said defendant, Robert Elmer Gallegos, is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 84] IN DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

[Title omitted]

TRIAL RESUMED, DEFENDANT'S ORAL MOTION FOR MISTRIAL DENIED, ETC.—June 12, 1961

At this day comes again Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant, Robert Elmer Gallegos, is brought into Court, and by his attorney, also comes.

Whereupon, the said defendant, Robert Elmer Gallegos, doth move the Court for a mistrial in his behalf; the same is argued by counsel to conclusion, and the Court being now sufficiently advised in the premises doth deny said motion.

Whereupon, comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard, nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing [fols. 85-86] upon the same, are committed to the custody of two sworn bailiffs, who are charged by the Court not to allow said jurors to separate, nor converse, or hold intercourse with any others.

Whereupon, it is Ordered by the Court that the trial of this cause be continued to the 15th day of June, A.D. 1959 at 10:00 o'clock A.M.

It is Further Ordered by the Court that all witnesses heretofore subpoenaed in this cause be excused to the 15th day of June, A.D. 1959, at 10:00 o'clock A.M., to come again at that date without being re-subpoenaed so to do.

Whereupon, the said defendant, Robert Elmer Gallegos, is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 87] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

No. 45708

[Title omitted]

MOTION TO SUPPRESS EVIDENCE—Filed June 15, 1959

Come now the defendants herein, by counsel, and move the Court to suppress statements, both oral and written, heretofore made by and alleged to have been made by the aforesaid defendants for the following reasons, to-wit:

1. That the defendants are of such ages, 12 and 14 respectively, that under the laws of the United States of America and the State of Colorado, they do not have sufficient understanding to be bound by any statements or any agreements made by them. Therefore the statements or statements allegedly made by them should be suppressed and the Court should forbid the prosecution to use them for any purpose whatsoever.

2. That the statements under no circumstances could be voluntary regardless of the supposed voluntariness of the aforesaid statements because of the minority of the two boys herein and the fact that they had no representation and could not make statements that could bind them in any way in any civil or criminal proceedings under the laws of the United States of America and the State of Colorado.

3. That the statements were given in the absence of any representation by counsel, and there was no representation by counsel, and also no representation on the part of [fol. 88] the parents of the two minor children herein charged with this serious offense and that under the laws of the State of Colorado and under the laws of the United States of America, all defendants charged with a criminal offense amounting to a felony are entitled to representation throughout the time.

4. That the statements and alleged statements, both oral and written, should be suppressed because the defendants were denied their constitutional rights in that they were not afforded counsel; they were not advised with any suf-

ficiency of understanding, because of their age, that any statement that they made could be used against them to convict them of the crime of murder; that they were not warned with any understanding that they could not make any statement without any ill effects on them and that if they refused to make any statement, that this would have no bearing on the matter herein, and that the statements as made must be wholly voluntary; and that by the very matter of age of each of the defendants herein, that they were frightened and that even though no threats or promises as such were made, that the implication of having officers and being confronted by officers without any counsel or without any friends to advise them, that these children would necessarily be under compulsion to make statements, and statements should be suppressed and excluded from consideration in this case.

5. Section 22-8-1, C. R. S., provides, among other things, that the Juvenile Court shall retain jurisdiction of a case that it originates, and another part of the same section provides: "A disposition of any child under this article or any evidence given in any such case, shall not in any criminal or other cause or proceeding whatever be lawful or proper evidence against such child for any purpose excepting in subsequent cases against the same child under [fol. 89] this article." This statute in effect provides that the statements used in the Juvenile Court or the evidence used in the Juvenile Court could not be used in the District Court, and for that reason the evidence must be suppressed as requested herein.

Therefore, for all of the reasons heretofore stated, it is respectfully requested that the Court suppress the statements, both oral and written, as aforesaid.

Respectfully submitted, /s/ Charles S. Vigil. /s/ Roger Cisneros, 711 E. & C. Building.

[fol. 90] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order Granting Defendant's Motion to Suppress Evidence as to Martinez only and Overrule Motion as to Robert Elmer Gallegos

(Hearing in chambers)

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Chambers and by his attorneys, also comes.

Whereupon, this cause coming on for hearing before Judge H. Joe Rawlinson, Jr. upon the defendant's Motion to Supress Evidence.

Said Motion is argued by counsel to conclusion and the Court being now sufficiently advised in the premises, doth grant said motion to Edward Raymond Martinez only and doth overrule said motion as to Robert Elmer Gallegos.

In District Court of Denver County

[Title omitted]

Trial Resumed, etc.—June 15, 1959

At this day comes Bert M. Keating, District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant, Robert Elmer Gallegos, is brought into Court and by his attorneys, also comes.

[fol. 91] And the said Jurors being now all here present in Court and in the Jury box, the trial of the issues herein joined is resumed.

Whereupon, comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others

touching the matters at issue herein, nor the evidence heard, nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the Court not to allow said jurors to separate, nor converse, or hold intercourse with any others.

Whereupon, it is Ordered by the Court that all witnesses heretofore subpoenaed in this cause be excused to the 16th day of June, A.D. 1959, at 10:00 o'clock A.M., to come again at that date without being re-subpoenaed so to do.

It is Further Ordered by the Court that the trial of this cause be continued to the 16th day of June, A.D. 1959, at 10:00 o'clock A.M.

Whereupon, the said defendant, Robert Elmer Gallegos, is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 92] IN DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

[Title omitted]

TRIAL RESUMED, ETC.—June 16, 1959

At this day comes Bert M. Keating, Esq., again, District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

And the said Jurors being now all here present in Court and in the Jury box, the trial of the issues herein joined is resumed.

Whereupon, comes the evidence, the hearing of which is continued to the conclusion of the People's case.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard, nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody

of two sworn bailiffs, who are charged by the Court not to allow said jurors to separate, nor converse, or hold intercourse with any others.

Whereupon, it is Ordered by the Court that all witnesses heretofore subpoenaed in this cause be excused to the 17th day of June, A. D. 1959, at 10:00 o'clock A. M., to come again at that date without being re-subpoenaed so to do.

[fol. 93] It is Further Ordered by the Court that the trial of this cause be continued to the 17th day of June, A. D. 1959, at 10:00 o'clock A. M.

Whereupon, the said defendant Robert Elmer Gallegos is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 94] In District Court of Denver County

No. 45708 Div. 8

[Title omitted]

Order Denying Defendant's Oral Motion to Strike Testimony of People—June 17, 1959

At this day comes again Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorney, also comes.

And the said Jurors being now all here present in Court and in the Jury box, the trial of the issues herein joined is resumed.

Whereupon, this cause coming on for hearing upon defendant's oral motion to strike testimony of the People's case.

Said motion is argued by counsel to conclusion and the Court being now sufficiently advised in the premises, doth deny said motion.

In District Court of Denver County

[Title omitted]

Order Denying Defendant's Oral Motion to Dismiss—June 17, 1959

At this day comes again Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

Whereupon, this cause coming on for hearing upon the [fol. 95] defendant's motion to dismiss this case.

Said motion is argued by counsel to conclusion and the Court being now sufficiently advised in the premises, doth deny said motion.

In District Court of Denver County

The People of the State of Colorado,

vs.

Robert Elmer Gallegos, (Edward Raymond Martinez)

Trial Resumed—June 17, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court, and by his attorneys, also comes.

And the said Jurors being now all here present in Court and in the Jury box, the trial of the issues herein joined is resumed.

Whereupon, comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard, nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the Court not

to allow said jurors to separate, nor converse, or hold intercourse with any others.

[fol. 96] And thereupon, it is Ordered by the Court that all witnesses heretofore subpoenaed in this cause be excused to the 18th day of June, A. D. 1959, at 10:00 o'clock A. M., to come again at that date without being re-subpoenaed so to do.

It is Further Ordered by the Court that the trial of this cause be continued to the 18th day of June, A. D. 1959, at 10:00 o'clock A. M.

Whereupon, the said defendant Robert Elmer Gallegos is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 97] In District Court of Denver County

No. 45708 Div. 8

Trial Resumed—June 18, 1959

At this day comes again Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

And the said Jurors being now all here present in Court and in the Jury box, the trial of the issues herein joined is resumed.

Whereupon, comes the evidence the hearing of which is concluded.

And the said jurors being each now cautioned by the Court not to converse among themselves nor with others touching the matters at issue herein, nor the evidence heard, nor any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication bearing upon the same, are committed to the custody of two sworn bailiffs, who are charged by the Court not to allow said jurors to separate, nor converse, or hold intercourse with any others.

Whereupon, it is Ordered by the Court that all witnesses heretofore subpoenaed in this cause be excused to [fol. 98] the 19th day of June, A. D. 1959, at 10:00 o'clock

A. M., to come again at that date without being resubpoenaed so to do.

It is Further Ordered by the Court that the trial of this cause be continued to the 19th day of June, A. D. 1959, at 10:00 o'clock A. M.

Whereupon, the said defendant Robert Elmer Gallegos is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

[fol. 99] In District Court of Denver County

No. 45708 Div. 8

Trial Resumed—June 19, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court, and by his attorneys, also comes.

And the said Jurors being now all here present in Court and in the Jury box, the trial of the issues herein joined is resumed.

And the said jurors having heard the evidence adduced herein as well on behalf of the said defendant as of the said People and being now duly instructed by the Court and having heard the arguments of counsel, retire to their room in charge of two sworn bailiffs, to consider of their verdict herein.

In District Court of Denver County

[Title omitted]

Verdict—June 19, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought [fol. 100] into Court and by his attorneys, also comes.

Whereupon, come again the said jurors, and on their oaths say:

> "We, the Jury, find the defendant, Robert Elmer Gallegos, Guilty of First Degree Murder as charged in the information herein, and fix the punishment at life imprisonment in the State penitentiary.
>
> James A. Newman, Foreman."

To which verdict of the jury, the said defendant Robert Elmer Gallegos by his attorney, duly excepts.

And thereupon, the said jurors being polled, upon motion of the defendant, each for himself says that this was his verdict, and is now his verdict herein.

And the verdict being thus received and recorded, the jury is discharged and allowed to separate.

Whereupon, it is Ordered by the Court that the expense of the said jury incurred during their consideration of this cause be, and the same hereby is, taxed against the said People.

And thereupon, the said defendant, Robert Elmer Gallegos, is remanded to the authorities of the Juvenile Hall, City and County of Denver, State of Colorado.

IN DISTRICT COURT OF DENVER COUNTY

[Title omitted]

ORDER GRANTING DEFENDANT 30 DAYS TO FILE MOTION TO SET ASIDE VERDICT, ETC.—June 19, 1959

At this day it is Ordered by the Court that the said defendant Robert Elmer Gallegos be, and he hereby is, granted time and until Thirty (30) days from this day in which to file herein a motion to set aside the verdict of the jury and for a new trial in this behalf.

[fol. 101] IN THE DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

PEOPLE OF THE STATE OF COLORADO,

versus

ROBERT ELMER GALLEGOS and EDWARD RAYMOND MARTINEZ,
Defendants

VERDICT—June 19, 1959

We, the Jury, find the defendant, Robert Elmer Gallegos, Guilty of Involuntary Manslaughter as charged in the information herein.

Requested by the Defendant and refused by the Court.

H. Joe. Rawlinson, Judge.

——— ———, Foreman.

[fol. 102] IN THE DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

PEOPLE OF THE STATE OF COLORADO,

versus

ROBERT ELMER GALLEGOS and EDWARD RAYMOND MARTINEZ,
Defendants

VERDICT—June 19, 1959

We, the Jury, find the defendant, Robert Elmer Gallegos, Guilty of Second Degree Murder as charged in the information herein.

Requested by the Defedant and refused by the Court.

H. Joe Rawlinson, Judge.

——— ———, Foreman.

IN THE DISTRICT COURT OF DENVER COUNTY

No. 45708 Div. 8

PEOPLE OF THE STATE OF COLORADO,

versus

ROBERT ELMER GALLEGOS and EDWARD RAYMOND MARTINEZ,
Defendants

VERDICT—June 19, 1959

We, the Jury, find the defendant, Robert Elmer Gallegos, Guilty of Voluntary Manslaughter as charged in the information herein.

Requested by the Defendant and refused by the Court.

H. Joe Rawlinson. Judge.

——— ———, Foreman.

[fols. 103-104] [File endorsement omitted]

IN THE DISTRICT COURT OF DENVER COUNTY

PEOPLE OF THE STATE OF COLORADO,

versus

ROBERT ELMER GALLEGOS and EDWARD RAYMOND MARTINEZ,
Defendants

No. 45708 Div. 8

VERDICT—Filed June 19, 1959

We, the Jury, find the defendant, Robert Elmer Gallegos, Guilty of First Degree Murder as charged in the information herein, and fix the punishment at life imprisonment in the State penitentiary.

James A. Newmen, Foreman.

[fol. 165] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR THE CITY AND STATE OF COLORADO

Criminal Action No. 45708 Div. 8

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,

vs.

ROBERT ELMER GALLEGOS, Defendant

MOTION FOR A NEW TRIAL AND TO SET ASIDE VERDICT Filed July 29, 1959

Denied August , H.J.R., Jr.

Comes now the defendant, Robert Elmer Gallegos, by counsel, and moves this Honorable Court for an order setting aside and vacating the verdict returned heretofore, and granting the defendant a new trial, and as grounds therefore, the defendant states that the Court erred in that:

1. The verdict of the jury is contrary to the law and the evidence.

2. That the prosecution failed to prove the venue beyond a reasonable doubt.

3. The Court refusal to grant defendant a motion for a Change of Venue from the State District Court, City and County of Denver, to the Juvenile Court, City and County of Denver.

4. The Court's refusal to grant a Motion for Severance, since the age of the defendants was a material element in this case, and the defendants were entitled to a separate trial.

5. The Court's refusal to quash the information on the grounds that the information did not state that the defendants should know the difference between good and evil, this being a material part of the charge.

6. The Court's refusal to quash and dismiss the information in that the information was duplicitous, since both defendants are charged with doing the same act, and the in-

formation did not contain sufficient facts upon which to sustain the charge contained therein.

7. The Court's refusal to grant a motion for Waiver of [fol. 106] a Jury Trial.

8. The Court's refusal to accept a Plea of Former Jeopardy for the reason that the defendants had heretofore been tried and punished in another proceeding, and that similar and the same evidence was used in the present action herein.

9. The Court's refusal to grant a preliminary hearing.

10. In refusing to grant defendants motion for mistrial on the opening statement of the District Attorney in which he alleged that the psychiatrist had been paid by tax money which was prejudicial to the defendants.

11. In admitting the endorsement of witnesses of the three psychiatrists and of Dr. D. D. Kirk and Allen Aoyagi, the witnesses were endorsed on the 8th of June, 1959, and defense was not notified until the morning of the trial.

12. In refusing to exclude testimony of psychiatrists on the grounds that the psychiatrists were defendant's witnesses and as there was privileged and confidential communication between the defendants and the doctors.

13. In overruling the defendant's objections for the recall of Dr. Polley since Dr. Polley had been examined by the prosecution, and was recalled by the prosecution over defendant's objections.

14. In refusing to exclude Dr. Ogura's Coroner's Report on the grounds that the report was based on hearsay since he testified he had talked to other doctors in formulating his opinion.

15. In refusing to exclude statement or confession on the grounds that confession was elicited from the boys, one eight years old, was never charged, the other was twelve years old, and the last fourteen years old, and refusing to grant defendants motion to Suppress the Evidence on the grounds that the defendants were never advised of their constitutional rights, that this statement or confession could be used against them in a trial of this kind.

16. In refusing to grant defendants Motion to Suppress the Evidence on the grounds that this evidence had been used in a hearing in Juvenile Court in which the two defendants were sentenced to Golden, and is in direct conflict

[fol. 107] with the Laws of Colorado, 1953 CRS 22 8 1, providing that no evidence which is used at a hearing of a juvenile delinquent can be used in another court proceeding whatsoever.

17. In refusing to grant defendant's Motion to Suppress the Evidence on the grounds that the defendants are of such ages, 12 and 14 respectively, and under the laws of the United States of America and the State of Colorado, they did not have sufficient understanding to be bound by any statements or any agreements made by them.

18. In refusing to grant defendant's Motion to Suppress the Evidence on the ground that the statements could not be voluntary regardless of the supposed voluntariness of the statements because of the minority of the two boys herein and the fact that they had no representation and could not make statements that could bind them in any way in any civil or criminal proceedings.

19. In refusing to grant defendant's Motion for Mistrial and any Reference to Juvenile Court Hearing as being prejudicial.

20. In granting prosecutions motion to instruct the jury to disregard Mrs. Gallegos' testimony about not being allowed to see Robert Gallegos on the grounds that it was hearsay. No objection having been made at the time of the testimony, the Court erred in instructing the jury to disregard Mrs. Gallegos' testimony when the objection was made later. The testimony in question was given on direct examination. The motion to disregard was made during cross examination.

21. In allowing the prosecution to introduce into evidence a shoe brush allegedly used in a similar offense, tl is being immaterial and prejudicial to the defendant.

22. In allowing prosecution to comment or make reference to a knife when there was no evidence before the Court about a knife being used.

23. In refusing to grant defendant's Motion to Dismiss on the grounds that to prove aggravated robbery, you have to show defendant was armed with a dangerous weapon. There being no evidence of a dangerous weapon used in the alleged commission of the crime.

[fol. 108] 24. In refusing to grant defendant's motion to quash because the information did not state the age of the

boys, which is a material element in this case, and the fact that the death had occurred within one year and a day of the alleged attack.

25. In overruling defendant's objection to the order of proof in that the death of the deceased was proved before any corpus delicti was proved.

26. In refusing to grant defendant's motion to strike testimony of all witnesses.

27. In refusing to grant defendant's motion to strike out the written confession on the grounds that the prosecution had not proved the corpus delicti.

28. In refusing to grant defendant's motion to the admission of the written confession on the grounds that the corpus delicti of the robbery which is an essential element in this case was not proved by corroborating evidence.

29. In refusing to grant defendant's motion to strike testimony of any similar offense on the grounds that the only similar offense that could be introduced would be the evidence of another murder. In this case all the evidence of similar was at the most an assault which could in no way be considered a similar offense.

30. In refusing to grant defendant's motion for a directed verdict based on the fact that there was no corroborative evidence.

31. In overruling defendant's objection to the prosecution's question to witness Martinez about being convicted of any prior felony and going into the type of felony which he was convicted and the time and the place.

32. The refusal of the Court to give defendant tendered instructions, being defendant's numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19.

33. Refusal to give tendered verdict on second degree murder, voluntary manslaughter, and involuntary manslaughter, and misfortune as proper degrees of murder, after having previously ruled that defendants could not waive jury, because jury had to determine first or second degree.

[fol. 109] 34. Refusal to instruct the jury to disregard statement, since the boys had already been committed in the Juvenile Court and committed to Golden.

35. Refusal to instruct the jury to disregard statements of Deputy District Attorney, Mel Rossman, in final argu-

ment in which he stated in his closing argument, "that all the hoodlums of Denver are waiting for your verdict." There was no evidence before the jury to substantiate this statement, it was prejudicial and violated the rights of defendants herein.

36. In failing to instruct the jury to disregard statement of Deputy District Attorney, Rossman, in final arguments in which he stated that most hotels that do not have any running water have water in pitchers and glasses from which to drink, there being no evidence before the jury of this fact.

37. Refusal to withhold alleged confessions from consideration of the jury since it was affirmatively shown that statements were based on what eight year old Richard had stated and he was disqualified as a witness under the law. Also the statements were so mixed that the officer first investigating stated he could not separate one from another of the three boys that were questioned simultaneously. All three boys were questioned simultaneously and one statement was secured and signed by all three, and the Court permitted the part allegedly made by Bobby Gallegos, 14, to be admitted, but withheld the statements of Richard, 8, and Eddie Martinez, 12. Furthermore it was shown that no constitutional warning was given as required.

Respectfully submitted, /s/ Charles S. Vigil. /s/ Roger Cisneros, Attorneys for Defendant.

[fol. 110] In District Court of Denver County

[Title omitted]

No. 45708

Order Denying Motion for New Trial and to Set Aside Verdict—August 18, 1959

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

Whereupon, this cause coming on for hearing upon the written motion of the said defendant Robert Elmer Gallegos to set aside the verdict of the jury herein, and for a new trial in this behalf, said motion is argued by counsel, and the Court being now sufficiently advised in the premises, doth deny said motion; to which the said defendant Robert Elmer Gallegos by his attorneys, duly excepts.

In District Court of Denver County

The People of the State of Colorado

vs.

Robert Elmer Gallegos

Sentence—August 18, 1959

(Life Imprisonment)

At this day comes Bert M. Keating, Esq., District Attorney who prosecutes the pleas of the People in this behalf, and the said defendant Robert Elmer Gallegos is brought into Court and by his attorneys, also comes.

Whereupon, the said defendant is brought to the bar of the Court, and it is enquired of him if anything he hath to say why judgment of the law should not now be pronounced against him. And he nothing saith.

[fol. 111] Whereupon, it is considered by the Court that the said defendant be by the Manager of Safety and Excise and Ex-Officio Sheriff of the City and County of Denver, removed hence to the Common Jail of the City and County of Denver, and from thence by the said Manager of Safety and Excise and Ex-Officio Sheriff conveyed, with all convenient speed, to the State Penitentiary, at Canon City, Colorado, there to be delivered to the Warden or Keeper thereof, to be by him kept and confined therein, at hard labor, for the remainder of his natural life, to be fed and clothed as the law directs.

And it is further considered by the Court that the said People do have and recover of and from the said defendant its costs in this behalf laid out and expended, to be taxed.

And thereupon, the said prisioner is remanded to the custody of the Manager of Safety and Excise and Ex-Officio Sheriff of the City and County of Denver.

In District Court of Denver County

The People of the State of Colorado,

vs.

Robert Elmer Gallegos

Order Staying Judgment—August 18, 1959

At this day comes the defendant Robert Elmer Gallegos by Charles S. Vigil, Esq., and Roger Cisneros, Esq. his attorneys, and on his motion, and for good and sufficient reason to the Court appearing,

It is Ordered by the Court that execution of the above judgment be stayed until Ninety (90) days from this date, and that said defendant shall remain in the custody of the authorities at the Juvenile Hall.

[fols. 112-113] In District Court of Denver County

[Title omitted]

Order Re Record—August 18, 1959

At this day it is Ordered by the Court that the defendant herein, Robert Elmer Gallegos, that record of transcript of trial be granted to defendant at State expense.

[fol. 114] [File endorsement omitted]

IN THE DISTRICT COURT OF DENVER COUNTY

Criminal Divisions

No. 45708

[Title omitted]

DESIGNATION OF RECORD—Filed September 8, 1959

The Clerk of this Court will please prepare for use in the Appellate Court an authenticated transcript of the records in the above entitled cause and the following papers filed, to-wit:

Affidavit and Information, Reporter's Transcript, Pleas, Motions and Orders, Trial Orders, Minute Orders, Verdict and Judgment, Motion for New Trial and Ruling, Sentence, Stay of Execution, Time for Bill of Exceptions, All exhibits and miscellaneous records.

All orders of Court; and attach to the same the Depositions and original Bill of Exceptions, and certify the same with all convenient speed.

/s/ Charles S. Vigil, /s/ Roger Cisneros, Attorneys for Defendant.

[fols. 115-118] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 119-121] In the District Court in and for the City and County of Denver, State of Colorado

Second Judicial District

Case No. 45708 Div. 8

The People of the State of Colorado,

vs.

Robert Elmer Gallegos and Edward Raymond Martinez, Defendants

Defendant's Bill of Exceptions—June 9, 1959

Be it Remembered That heretofore and on, to-wit, the 9th day of June, A.D. 1959, the same being one of the regular judicial days of the April, 1959, Term of said Court, the above entitled cause came on regularly for trial before the Honorable H. Joe Rawlinson, Jr., Judge of said Court presiding in Division VIII thereof, and a jury of twelve and one alternate duly impaneled, examined, selected and sworn to try said cause.

And Thereupon, after opening statement of counsel for the People, the following evidence was given and offered and proceedings had, to-wit:

Appearances:

For the People: Bert M. Keating, Esq., District Attorney, By Melvin Rossman, Esq., Chief Deputy, and Martin A. Kane, Esq., Deputy.

For the Defendants: Roger Cisneros, Esq., and Charles S. Vigil, Esq.

[fol. 122] Colloquy Between Court and Counsel

Tuesday, June 9, 1959 10 a.m.

In Chambers

Mr. Vigil: If the Court please, I have a Motion for Preliminary Hearing.

The Court: Is this to be in the nature of a Pretrial Conference?

Mr. Vigil: I had no intent at the time of filing this motion to have anything in the nature of a Pretrial Conference, only to have a record that we could argue this point if it were necessary.

The Court: Let the record show that the Court, on June 2, 1959, originally granted the Motion for Preliminary Hearing, it being the Court's understanding it was in the nature of Pretrial Conference to see if the parties were ready to discuss ways and means of trying the case. However, in view of Mr. Vigil's statement of what he intended by "Preliminary Hearing," the motion is denied.

Mr. Vigil: Note our exception.

The Court: And let the record show that I have noted on the motion, "Denied," and scratched out the word "Granted."

Now we have a motion wherein the defendants ask that they have a doctor present during the trial and state they do not have the funds to pay for a doctor.

Mr. Vigil: We have already stated to the district attorney that the purpose of this is to have a medical doctor available so that we could possibily consistently rebut any testimony that might be offered on the part of the prosecution to show the cause of death and, of course, the only one who could do that would be a doctor, and in view of the [fol. 123] financial circumstances of the parents of these boys, we feel the Court should properly appoint a doctor.

Mr. Rossman: Your Honor, we would merely inquire of the Court if this would not be setting a precedent without any possibility of being granted under any statute I am aware of. Certainly the Court, in its discretion, can always appoint anyone he sees fit, but I think the issues should be clear under such circumstances and I do not think there are any issues involved in this matter to that extent. And for the further reason that we know of no ways or means that the Court could justify the payment of any doctor under these circumstances.

We do want to go on record as stating our position in this matter.

The Court: The Court would state that it does not understand the motion. I did not know there was any question in the case of any medical defects.

Mr. Vigil: The medical question, in this case the evidence

will probably show that the deceased died as a result of various ailments in his make-up. So the evidence necessarily will be on the part of the doctors—who will be medical doctors—as to cause of death and the defense must have some one who will be familiar with the terminology and also the fact of the cause of death, statements that might be made by witnesses for the prosecution, and, of course, our position is we are entitled to this. First of all, we have already shown to the Court by affidavits that the parents of the defendants cannot hire psychiatrists and in that position we feel the defendants must be protected. We have no [fol. 124] funds with which to do it; we have no way of getting a doctor to come here and listen to the testimony and possibly refute it. The cause of death is an important element in the case, it is probably the crucial element so far as our case is concerned.

The Court: Your theory is that if you had the money you would pay your doctor to attend the trial and listen to the testimony.

Mr. Vigil: That is correct.

(Discussion off the record.)

Mr. Rossman: Let me make one thing clear. I have information that the defense has received a copy of the pathologist's report and I think before the Court could even consider the allowance of anything that they should know, or would know by now whether there is anything which appears in that report which would create any real issues.

Mr. Vigil: I do not think it is necessary for us to go into that.

The Court: Do you have a copy of the pathologist's report?

(No response.)

Mr. Rossman: Let the record show we enter our objection to the motion submitted by the defendants for the appointment of a doctor.

(Further discussion off the record.)

The Court: I cannot appoint a doctor. You will have to submit a bill for his services and we will have a hearing on it. Go ahead and get the doctor. Of course, he will have to be paid—either they will have to pay him or I will have to do it.

[fol. 125] Let the record show that the petition filed requesting the Court to appoint a medical doctor to sit through the trial is denied at this time for the reason that Mr. Cisneros was retained by the parents of the defendants to represent them and not appointed by the Court, and that the Court has advised counsel to go ahead and retain their doctor to sit through the trial, and if counsel desires, at the conclusion of the trial, to have a hearing on the matter of whether the parents should pay the doctor or the Court pay for his services, they can file the proper motion.

It is my understanding, Mr. Vigil, that you will have a medical doctor here during the testimony of the pathologist and we will take up the matter of paying for his services later.

Mr. Rossman: We ask leave at this time to file with the Court motions for the additional endorsement of witnesses, copies of all which have been served upon the defendants' attorneys and receipted for by them.

The court will note that as to these three witnesses, the Doctors, there certainly can be no surprise. We are merely preserving our record by the endorsement of these witnesses in view of the fact there may be an issue involved which will require their testimony.

Mr. Vigil: I think, for the record, we must object to the endorsement of these witnesses at this time and I think there are many reasons that this is improper, among which is the fact they were appointed by the Court for the defendants.

Mr. Kane: Yesterday, I personally advised Mr. Cisneros [fol. 126] that we intended to endorse these witnesses and asked if there would be any objection, and he said there would not be an objection to the endorsement of these witnesses today.

The Court: The record will show these three doctors were appointed by the Court to examine these defendants.

Mr. Rossman: We ask leave at this time to endorse the names which appear on the additional endorsements, copies

of which have been receipted for by the defendants and their attorneys, and as grounds for this motion we advise the Court that it was not until late last week we learned of their existence.

Mr. Vigil: We will, if the Court please, object to the endorsement of these witnesses.

The Court: Do you request a continuance?

Mr. Vigil: No, we do not.

The Court: Let the record show if the defense was caught by surpise by the endorsement of these witnesses, the Court would grant a continuance.

Mr. Vigil: Let the record note our objection.

Mr. Rossman: Let the record show in this respect that on Thursday of last week I saw Mr. Cisneros and advised him this was going to be done and I asked him at that time if he believed he would want a continuance as a result of our making application to file the endorsement of these witnesses and he said he would not.

[fol. 127] IN OPEN COURT

The Court: Gentlemen, you ready for trial?

Mr. Rossman: The People are ready, your Honor.

Mr. Vigil: The defendants are ready.

The Court: Call the jury.

[fol. 128] Thursday, June 11, 1959 2:30 p. m.

Thereupon, during the selection of the jury, the following testimony was received in Chambers out of the presence of the jury.

DARLENE E. FLEETWOOD, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Mr. Vigil: I would like to have these records marked as exhibits and then have them turned over to the Clerk of the Court, for the reason that I am informed by the witness, Mrs. Fleetwood, that the rules of the Denver General Hospital forbid her showing these records to anyone un-

less they are a part of the court trial. So she asked us to present them to the Court.

Examination.

By the Court:

Q. The one is for Robert Smith and the other for John Kruhd?
A. Yes.
Q. Are those the official records?
A. Yes.
Q. Are you the custodian of the records?
A. Yes, I am.
Q. This is the complete record and complete case history?
A. Yes, of Mr. Smith.
Q. And the other is on Mr. Kruhd?
A. That is right.

The Court: Is there any objection?

[fol. 129] Mr. Rossman: No, I have no objection and we have no objection to their being here for either side and being presented without any further formal proof.

The Court: The Court will order the records to be retained by the Court. I do not think they should be marked at this time.

Mr. Rossman: We can agree they are the official records and they can be admitted without any formal proof.

Mr. Vigil: I think we better leave it on the basis that at the time of the trial they can be introduced.

The Court: The Court will take custody of the records and I will release them when the trial is over.

[fol. 130] Friday, June 12, 1959 10:00 a. m.

Court convened pursuant to recess.

Appearances as heretofore noted.

And Thereupon the following proceedings were had:

IN CHAMBERS

out of the presence of the jury:

MOTION TO DISMISS INFORMATION & DENIAL THEREOF

Mr. Vigil: The defendants move to dismiss the information as filed by the District Attorney for the reason that the information is incomplete and does not charge an offense under the statutes of Colorado, and as drawn is under statutes that are unconstitutional both under the laws of the State of Colorado and under the laws of the United States of America.

The Court: The information appears to the Court to be sufficient and the motion is denied.

Mr. Vigil: I will save an exception to the Court's ruling.

IN THE PRESENCE OF THE JURY

Mr. Vigil: May it please the Court, I should like to move for the exclusion of all witnesses.

The Court: Are there any witnesses in court who will testify in this case? (Witnesses excluded.)

Who are you going to keep, Mr. Rossman?

Mr. Rossman: Mr. P. O. Chism, your Honor.

Mr. Vigil: We will keep the parents here, two parents we are entitled to keep.

The Court: All right.

(Opening statement by the People's counsel.)

Mr. Vigil: We will reserve our opening statement, your [fol. 131] Honor.

The Court: All right, Mr. Vigil.

Call your first witness.

And Thereupon the People, to Sustain the Issues in their Behalf, Gave and offered in evidence as follows:

H. J. Holland, called as a witness for the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. State your name please.
A. Harry J. Holland.
Q. What is your occupation?
A. Police officer for the City and County of Denver.
Q. Were you so assigned on December 20, 1958?
A. Yes, sir.
Q. And what were your duties on that date?
A. I worked a district car, No. 11.
Q. What is the duty of district car No. 11 as it existed on December 20, 1958?
A. To handle the radio calls and such police work as comes before us.
Q. Where you with anyone on that date?
A. Yes, sir.
Q. Whom were you with?
A. Officer Weston.
Q. What area did you cover?
[fol. 132] A. From Larimer Street to Marion between Seventeenth and Twenty-third.
Q. Would that include the area of 1229 Eighteenth Street?
A. Yes.
Q. Is that address in the City and County of Denver, State of Colorado?
A. Yes, it is.
Q. What is located at that address?
A. A hotel.
Q. What is the name of that hotel?
A. Victor Hotel.
Q. Did you have a call while in that area to go to that hotel at any time on that date?
A. Yes.
Q. When?
A. Approximately 9:00 p. m.
Q. On what date?
A. On the 20th of December, 1958.

Q. At that time did you have occasion to see Robert F. Smith?

A. Yes.

Q. Where did you see him?

A. In the hotel at that address.

Q. Under what circumstances?

A. We got a radio call.

Q. Did you see Mr. Smith?

A. Yes.

Q. What was his condition at that time?

A. His condition was very bad as far as his appearance [fol. 133] was concerned.

Q. Can you describe it?

A. He appeared to us to be badly beaten about the face and head.

Q. Can you describe more in detail what the appearance was?

A. Yes. He had bruises and marks on the right side of his forehead and down the side of his face on the left side. His jaw was bruised and marked up. Under his chin he had a small laceration, a small cut under his chin into his throat.

Q. What did you do upon seeing him in that condition?

A. We questioned him as to what happened, and in the meantime we took Mr. Smith to Denver General Hospital in the police car.

Q. Was he conscious at that time?

A. Yes, sir.

Q. Was he able to talk to you?

A. Yes, sir.

Q. What did you do upon arrival at the Denver General Hospital?

A. We took him into emergency to check him into the hospital and thereafter they took him to the emergency room and that is when we last seen him.

Q. When did you receive the call?

A. A few minutes before nine o'clock p. m.

Q. On December 20, 1958?

A. Correct.

Q. And how soon thereafter did you arrive at that place, that hotel?

A. A very few minutes, within the neighborhood of three [fol. 134] minutes.

Q. And from whom did you receive the call?
A. From the police radio.

Mr. Vigil: If the Court please, I think this would call for some conclusion unless he knows from whom he received the call.

The Court: I think he can say on the radio. He did not say what person.

Q. How long did it take from the time you made your first appearance at 1229 18th Street to take this man to the Denver General Hospital?
A. Approximately twenty minutes.
Q. Was the victim bleeding at the time?
A. Yes, sir.
Q. In what respect and where?
A. About his face, the bruises he had. There was one on his chin and the cut in his neck, and there was an abrasion on his forehead, about in this position (indicating) and it wasn't bleeding profusely, it was slightly.

Mr. Rossman: You may inquire.

Cross-examination.

By Mr. Vigil:

Q. Now this cut on the chin, did that appear to be a knife cut?
A. Yes.
Q. And the cuts on the head, did those appear to be knife cuts?
A. They weren't cuts, they were just bruises.
[fol. 135] Q. They weren't bleeding then?
A. One was bleeding. It was a skin abrasion, just like forcing the skin off.
Q. Now, Mr. Smith was lying on the floor, was he not?
A. No. When we seen him?
Q. Yes.
A. No.
Q. Do you know whether he had a fall?
A. I don't know anything about him falling.
Q. And you don't know anything about how he got this

cut on his chin, or the abrasion, or bruises, do you, that is of your own knowledge, you weren't there, were you?

A. No. I didn't see that.

Mr. Vigil: That is all.

(Witness cautioned by the Court and excused.)

ALLEN AOYAGI, called as a witness for the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. What is your name, please?
A. My name is Allen Aoyagi.
Q. Where do you live, Mr. Aoyagi?
A. I live in 1229 18th Street.
Q. And what is that place?
A. It is the Victor Hotel.
Q. And that is in the City and County of Denver, State [fol. 136] of Colorado?
A. Yes, sir.
Q. During his lifetime did you know Robert F. Smith?
A. Yes, I know him about two years.
Q. About how long?
A. Two years.
Q. What is your connection with the Victor Hotel?
A. I am the owner, also manager.
Q. You are the owner and manager?
A. Yes, sir.
Q. Were you serving in that capacity on December 20, 1958?
A. Yes.
Q. Did you have occasion to see Robert F. Smith on that date?
A. I didn't until nothing happened.
Q. No, did you see him on that date?
A. No, I didn't see him on that date.
Q. You didn't see him at all on that date?
A. Except the things that happened.

Q. But you did see him?
A. Yes, I do, yes.
Q. Now, Mr. Aoyagi, how long had he lived at that address?
A. I think about two years.
Q. And you got to know him pretty well, did you?
A. Yes, we did.
Q. How old a man was he?
A. I don't know exactly, but he was seventy something, he told me.
Q. On that date, December 20th, when did you first see him?
[fol. 137] A. First see him?
Q. Yes, approximately?
A. I imagine—it was pretty dark that day—I imagine around seven. I didn't look at the time, but I figured that, when this happened.
Q. What happened?
A. I was in the kitchen in the bank end of the building and these neighbors, Mr. Pettit, told me——
Mr. Vigil: I object to what anyone told him.
The Court: Sustained.
Mr. Vigil: This is a broad question that was asked. If he is going to repeat something the neighbors told him——
The Court: Let's avoid any argument. Just what you saw, not what someone told you.
Q. Did you receive a call to go somewhere, I mean in your hotel?
A. No.
Q. What happened?
A. Well, I come out, this man called me and I just went up to Mr. Smith's room.
Q. What room was that?
A. It was room 45; and I saw Mr. Smith had a cut on the throat and had blood on the throat, and he told me——
Mr. Vigil: We object to what anybody told him.
The Court: Sustained.
Q. You cannot state anything anyone told you——
A. He had blood on the throat.
Q. You must understand, Mr. Aoyagi, that you cannot

go into any conversation, just what you did. You saw him [fol. 138] in that condition you described?

A. Yes, I did. I saw him, he had blood on the throat. So I asked him what happened and he answered——

Q. You cannot say that.

A. I just saw him, then, but I called the police officer.

Q. How soon thereafter did the police arrive?

A. I think about half an hour.

Q. What happened at that time?

A. What happened at that time?

Q. Yes, did they leave with him?

A. Well, they were with him—I was with him until the police officer arrived, we were standing on the hallway.

Q. You were with him until the police officer arrived?

A. Yes.

Q. Did you ever see him again after that time?

A. No.

Mr. Rossman: You may inquire.

Cross-examination.

By Mr. Vigil:

Q. This cut on the chin was a knife cut, was it not?

A. I didn't notice, sir.

Q. Did it appear to be a knife cut?

A. I don't know for sure whether it was a knife cut.

Q. Did it appear to be a knife cut?

A. Well, I think so.

Mr. Vigil: That is all.

Mr. Rossman: No further questions.

(Witness cautioned by Court and excused.)

[fol. 139] JAMES CLAYTON HARPER, called as a witness for the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. Will you state your name, please?
A. James Clayton Harper.
Q. Where do you live?
A. 1229 18th Street.
Q. Is that the Victor Hotel?
A. That is correct.
Q. How long have you lived there?
A. Four or five years.
Q. Did you live there on December 20, 1958?
A. I did, yes, sir.
Q. Did you know Robert F. Smith?
A. I knew him.
Q. Did you know him personally?
A. Well, I have never talked to him but I was acquainted with him.
Q. Was he staying at that hotel?
A. Yes.
Q. Was he living there on December 20, 1958?
A. Yes, sir.
Q. On that date do you recall whether or not he was involved in any kind of a matter?
A. Yes.
Q. Were you personally present at that time?
A. Not the lower floor, no, sir.
[fol. 140] Q. But you did know of that fact, is that right?
A. Yes.
Q. Were you in the hotel on that date?
A. Yes, sir.
Q. From what hours were you there?
A. Oh, maybe three o'clock to seven o'clock, somewhere in there.
Q. Were you there about nine o'clock in the evening?
A. Yes.
Q. Did you have occasion to see the police arrive at that address on that date?

A. Yes.

Q. What time of the day would you say they arrived?

A. I would say around seven o'clock.

Q. Do you know for sure about the time?

A. No, sir. I don't.

Q. On that date did you have occasion, Mr. Harper, to see any children in the hotel?

A. Yes, sir.

Q. Do you recall the incident which caused the police to arrive at that address?

A. Yes, sir, I do.

Q. Did it have something to do with Mr. Smith?

A. Yes, sir.

Q. What was that incident?

A. The beating that two boys gave him.

Mr. Vigil: If the Court please, I am sure this witness does not know that of his own knowledge, I am sure he is drawing a conclusion.

[fol. 141] The Court: Does he know this of his own knowledge, Mr. Rossman?

Mr. Rossman: I will withdraw that question.

Mr. Vigil: And I think the jury should be instructed to disregard that answer.

The Court: The jury will disregard the last answer about the beating, and you cannot consider that evidence for any purpose whatsoever.

Q. Mr. Harper, prior to the arrival of the police, did you have occasion to see two boys in the hotel?

A. Yes, sir. I did.

Q. How soon before the police arrived?

A. I would say twenty or thirty minutes.

Q. What were the circumstances at that time that you saw the boys?

A. Well, they were up on the third floor and looked like they didn't know where they were going, and I asked them who they were looking for and they told me they were looking for their grandpa, is the words they used—this one (indicating.)

Q. What happened at that time?

A. I asked them the name and this one boy give me a name which I can't recall.

Q. The name of a tenant at the hotel?

A. Yes, sir.

Q. He gave the name of someone living at the hotel?

A. He give me a name, I can't recall it.

Q. Did you know the person whose name he gave you?

A. No, sir, I did not.

Q. Did any person by that name live at the hotel?

[fol. 142] A. No, sir.

Q. What happened at that time?

A. They went downstairs.

Q. Did you see them again?

A. No, sir, I did not.

Q. You say this was how long before the police arrived?

A. Around twenty or thirty minutes.

Q. Now, did you later at any time recognize either of the boys you saw there?

A. I believe that I recognize this boy here (indicating).

Mr. Vigil: If the Court please, unless he is certain, we object.

The Court: Either he can identify them or not. Sustained.

Q. Which of the two boys do you recall seeing in the room? Did you see either one of them in the room?

A. The second boy there looks very much like him.

Mr. Rossman: Let the record show that the witness is referring to the defendant, Gallegos.

Q. Now, you say they were where in the hotel?

A. On the third floor.

Q. How many floors are there?

A. Three.

Q. What floor did Mr. Smith live on?

A. The second floor.

Q. And you saw them go downstairs from the third floor?

A. Yes, sir.

Q. Where do you live?

A. I live in room 51.

[fol. 143] Q. Is that on the same floor as Mr. Smith?

A. No, sir, that is on the third floor.

Q. You didn't follow them downstairs?

A. No, sir.

Q. You don't know then what occurred, or whether they left the building?

A. No.

Q. How many of them were there?

A. Two.

Q. Would you recognize the other boy?

A. I have never seen the other boy.

Q. You saw two boys, did you?

A. I have never seen the other boy.

Q. Would you recognize him if you saw him?

A. I don't believe so.

Q. In other words, you don't know whether it was the other boy, you are not sure?

Mr. Vigil: If the Court please, this evidence must be beyond reasonable doubt, and they are trying to convict this boy. The only objection we make is that this witness cannot identify either of these boys. He said he couldn't recognize him.

The Court: Objection sustained.

Q. In any event, you saw two boys there at that time within twenty minutes before the police came. Is that right?

A. Yes.

Mr. Rossman: That is all.

[fol. 144] Cross-examination.

By Mr. Vigil:

Q. So far as your identifying either of these boys who are in the court room, you have never seen either of them from the date, December 20, 1958, that night, until today, have you?

A. I was here Tuesday, last Tuesday.

Q. You were here last Tuesday?

A. This Tuesday.

Q. That is the first time you had seen them?

A. Yes.

Q. Were you ever called to the police building and asked to identify anybody in the lineup?

A. No, sir.

Q. You cannot identify this one boy?

A. No, sir.

Q. All you are saying is that this second boy looks very much like one of the boys you say was up there in the hotel?

A. That is right.

Q. But you cannot positively say he was the boy, can you?

A. No, sir.

Mr. Vigil: That is all.

Mr. Rossman: No further questions.

(Witness cautioned by the Court and excused.)

(A short recess was taken.)

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

(Thereupon, People's Exhibits A and B were marked for identification.)

[fol. 145] Mr. Rossman: Let the record show that I have discussed with counsel for the defendants the fact that the question of identification is a collateral issue in the information and that pursuant to the proof of the question of identification we are prepared to offer into evidence pictures taken immediately after the death of the decedent at the morgue of the City and County of Denver. However, that I have discussed the matter with Mr. Vigil and pursuant to a stipulation which we are going to enter into, I would be willing to forego the offer of the pictures under a stipulation which would stipulate in effect between the People and the Defendants, that the question of identification of the decedent need not be proved in any formal manner, or in any other manner so far as that is concerned.

Mr. Vigil: If the Court please, we will not raise the question of identification.

Mr. Rossman: With that understanding, your Honor, the people will not offer the photographs of the deceased as a matter of proof in this case.

IN THE PRESENCE OF THE JURY.

MICHAEL POLLAY, called as a witness by the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Kane:

Q. Please state your name.
A. Michael Pollay.
Q. What is your occupation or profession?
[fol. 146] A. I am a neuro-surgical resident at the Denver General Hospital.
Q. How long have you been at the Denver General Hospital?
A. About a year.
Q. Would you briefly outline to the Court and jury your background, educational background and training?
A. I received my Bachelor of Science degree and medical certificate at the University of Wisconsin, and after two years in military—I interned at the Alameda County Hospital in Oakland—and after two years of military I came back as a neuro-surgical resident at the University of Colorado.
Q. Are you studying for a specialty now?
A. Yes.
Q. What is that specialty?
A. Neuro-surgery.
Q. Doctor, did you have occasion to examine one Robert F. Smith?
A. Yes, I did.
Q. And when did you examine him?
A. On the 24th of December.
Q. In the year 1958?
A. In the year 1958.
Q. And where did you examine him?
A. At Denver General Hospital.
Q. Were you able to discover if Mr. Smith was suffering from any injuries?
A. I was called to see the patient after he became unconscious and this is the first time I had seen the patient.

He had been in the hospital four days. The patient obviously had a fracture of the jaw, and when I examined [fol. 147] him he was responding to stimuli and was having some difficulty in breathing.

Q. Were you able to ascertain the nature of his injuries?

A. At the time we felt he had brain damage and possibly an associated blood clot on the brain.

Q. Did you have occasion to perform surgery on Mr. Smith?

A. Yes.

Q. What did you do?

A. The first procedure consisted of placing holes through the skull, and in doing so we were able to observe the covering of the brain and the brain itself.

Q. And was there brain damage?

A. We were not able to determine whether the brain substance itself was damaged. We didn't see this originally—I can explain this further.

Q. Would you, please, Doctor?

A. When we opened up the coverings of the brain, there was a great deal of water glass full of old clots sitting on top of the brain between the brain and the skull.

Q. Would these injuries be consistent to the blows about the face and head?

Mr. Vigil: If the Court please, we have to object to this line of questioning. This is a hypothetical question as to whether there were blows to the face and head, and that has not been established. We object to the order of proof. As long as it is kept on the examination whether it is consistent or inconsistent is improper at this time. [fol. 148] Mr. Kane: I will rephrase the question.

Q. On the basis of your examination were you able to form an opinion as to what caused the blood clot in the head?

A. The blood clots are secondary to the injury of striking the head, or transmitted through the head.

Q. Was there evident injury to the face?

A. There was evidence of injury to the jaw of the victim.

Q. And those injuries to the jaw would they be slight blows or heavy blows?

A. They would be fairly severe blows.

Q. Would you explain to the Court and jury fully the treatment that you gave Mr. Smith?

A. After removing the blood clot which was pressing on the brain we removed the pressure which allowed the brain, if it was capable of re-expanding, to resume its normal function. Immediately the threat of death was removed. Generally, following such a pressure, you have to maintain the patient's nutrition until the brain can recover. Such was done. A tube was placed in his windpipe so we could clean out his windpipe and lungs, since he was incapable of doing this himself. We also fed him through the veins to keep up his nutrition. Other than this there isn't much that can be done, except to protect the patient. The patient, however, did not improve. He remained unconscious, responded in an abnormal way to various types of tests, and we decided he might have accumulated more blood in this space above the brain and nine days later more exploratory holes were made in the skull and more fluid was removed. The brain did not recover very well, as a brain will. The brain did not re-[fol. 149] expand and the patient was given the usual care. However, he subsequently expired.

Q. Do you recall when the patient expired, Doctor?

A. I cannot recall the exact date. I have it here, however, in the chart. The patient expired on the 26th of January at 8:10 p. m.

Q. 1959?

A. 1959.

Q. And that was in the hospital?

A. That was at Denver General Hospital.

Q. Doctor, were you able to form an opinion as to the cause of death?

A. At the time of death, it was our feeling clinically that this gentleman died of brain injuries subsequent to brain injuries.

Q. Did the patient ever recover consciousness from the time you examined him?

A. No.

Q. And that would be on the 24th of December?

A. On the 24th of December.

Mr. Kane: I have no further questions.

Cross-examination.

By Mr. Vigil:

Q. Doctor, were you the first one to see the deceased?

A. No, sir, I was not.

Q. Who was the first one to see him?

A. The first one to see the patient was an interne in the emergency room.

[fol. 150] Q. The first one to see him was an interne in the emergency room. Do you know who the interne was?

A. I shall look it up. Dr. Brasel and Dr. Kurtz. The additional surgeon also saw him.

Q. At what time did these two doctors see the deceased?

A. Nine p. m. December 20, 1958.

Q. And how much later did you see the deceased?

A. We were called in consultation four days later, approximately.

Q. At that time you saw the deceased, did you notice a cut in his chin?

A. Yes, sir.

Q. Was that obviously a knife cut?

A. I don't know.

Q. That was a cut made by some sharp instrument, was it not?

A. By some sharp instrument.

Q. You indicated there was a broken jaw that was caused by some heavy blow or force?

A. Yes.

Q. That was the principal thing you noticed on the deceased?

A. Outside of his neurological or brain status.

Q. Well, you didn't notice any other bruises or marks except a broken jaw?

A. He had, I believe, in the neck there was a black and blue mark of some sort, at the angle of the jaw and the neck. This is all I remember noticing as far as external signs of treatment.

[fol. 151] Q. I believe you stated the mark you noticed, he had a jaw that was broken and apparently nothing else, and that is what I was asking you?

A. Yes.

Q. At the time you made your examination there were no bruises or other marks that you noticed?

A. That I noticed, no.

Q. Now with reference to the operation, isn't it a practice to operate with the permission of the patient or someone in his behalf who has relationship sufficient to permit this?

A. If this is possible and if time allows. Otherwise we secure permission through the director of the hospital, Dr. Horwitz, in cases where we are unable to locate an individual who can sign.

Q. Now, in this case you did not secure permission from the patient or someone in his behalf, did you?

A. Excuse me just one minute. A sister signed the consent to the operation on both operative consent sheets.

Q. Now, in the operation itself did anything unusual occur?

A. As far as operative technique only?

Q. Was anything done in the operation that might have been of some importance in your operation?

A. I am afraid that I just don't understand.

Q. Was this a perfectly normal operation in every respect?

A. I would say so.

Q. As a matter of fact, didn't you sever an artery?

[fol. 152] A. This is a part of the procedure. When one goes through any tissue one has to go through the blood supply that supplies this tissue.

Q. Wasn't this something you felt was unusual?

A. Let me refer to my operative report. There is nothing in my operative report to indicate any vessel was severed that should not have been.

(Witness hands report to counsel.)

Q. You have this in the report, I will read this to you—"Brain is not markedly depressed." This refers apparently to when you first opened the brain. This was the first procedure, and what does that mean?

A. Many times when the pressure has been placed on the brain for a long time, the brain is forced down in the bony case it is enclosed in and it gives evidence of pressure being on the brain a longer period of time.

Q. And if it is not markedly depressed, what does that mean?

A. That is was not markedly depressed.

Q. Is that a symptom of some kind?

A. No, it really serves, sir, as sort of a guide to us when we remove the fluid whether the brain leaves it, it illustrates there has been pressure on the brain and on removing the pressure from the brain, if it is markedly depressed and comes up quite well, this is very, very favorable, showing the brain has not been too severely damaged.

Q. The next statement you have here is, "An attempt was made——

A. Sir, before going over that in the operative report, who signed that?

[fol. 153] Q. Dr. Stuteville and Dr. Knight.

A I can explain that if you wish.

Q. Will ask you this, "An attempt was made to remove some of the subdural membrane during which a large cortical artery was inadvertently torn." Can you explain that, Doctor?

A. Personally, in a subdural membrane, this blood below the outer covering of the brain, when the fluid is there for a certain period of time, we will say more than a week, perhaps longer than that, a membrane forms and this membrane, or covering which encloses this clot or fluid, and this covering is very closely applied not only to the outer covering of the brain but also to the brain itself, and occasionally one attempts, if one can, to remove this sack, the reason being by removal of the sack you perhaps can stop the re-accumulation of fluid. This is an extremely difficult thing and it is not uncommon in removing this sack a blood vessel is torn and, as he said, inadvertently. It is something that is associated rather commonly with removing a subdural membrane, although it is inadvertent.

Q. What was the effect of inadvertently cutting a cortical artery?

A. I have no idea what artery was cut. I was not in on that procedure.

Q. What would be the effect of it, that is what I am asking. Would a large amount of blood necessarily go into the brain?

A. Most likely, no, because they are usually immediately clipped or tied, or some other method used to stop the flow.

[fol. 154] Q. Now, do you know anything about the cause of death being listed as bronchial pneumonia on the death certificate?

A. No, sir.

(Paper handed witness.)

Q. Would you look at that, please?

A. Would you repeat your question?

Q. I asked you to refer to that copy of the death certificate and acked you if you had seen that before?

A. I cannot remember seeing it, I may have.

Q. It does state that the primary cause of death is bronchial pneumonia, does it not?

A. As listed here, the immediate cause was listed as bronchial pneumonia.

Q. Is that contrary to your determination as you have stated here?

A. As I have stated here, it is contrary, not that bronchial pneumonia was not present, but the order as listed.

Q. The order is quite important in this trial, is it not?

A. I am not sure.

Q. You are not sure. What other ailments did the deceased have that might have resulted in his death?

A. Directly, or aided?

Q. Directly or indirectly?

A. This bronchial pneumonia, the pneumonia he might have had was contributory and it was secondary to his inability to breath.

Q. This man was quite old, was he not?

A. Yes.

Q. And he did have blood pressure problems, is that true?

[fol. 155] A. That is my understanding, that is correct.

Q. You examined him, did you not, before you performed your operation?

A. That is correct.

Q. Do you recall what his blood pressure was?

A. I wouldn't give you a figure without looking at the chart. His blood pressure varied a great deal, anywhere from a pressure of 74 up to 150, but his blood pressure usually remained around 150.

Q. And what is the consequence of this variation?

A. Of this variation—when he first came in and the pressure was 70, he was somewhat in shock, and he was treated for this shock which was initiated in the emergency room.

Q. What other difficulties did the deceased have according to your records?

A. This gentleman also had evidence of arteriosclerosis.

Q. Can you explain that in ordinary terms so all of us can understand it?

A. He had reasonably normal hardening of the arteries for a man of seventy-four or seventy-five.

Q. What is the effect of this hardening of the arteries?

A. The effect might be nothing, not of consequence at all.

Q. On the other hand, it might be of considerable consequence could it not?

A. Insofar as what——

Q. Well, of the cause of death?

A. I suppose it is possible.

Q. Is it possible this could have caused death, or contributed to the cause of death?

[fol. 156] A. That it could have caused death?

Q. Yes.

A. I think it could—I mean, theoretically it could have.

Q. Now, so far as you are concerned, the death certificate indicates the deceased died as a primary result of bronchial pneumonia which was the primary cause of death. Is that correct?

A. No, that is not correct.

Q. The important cause of death was bronchial pneumonia, is that correct?

A. I would say I don't know. You would have to ask a pathologist who is an expert on this sort of thing.

Q. You are not an expert on this sort of thing?

A. A pathologist is an expert. Clinically I can tell you what we felt.

Q. Can you tell me one other thing, in reference to the treatment of the deceased, what sort of drugs were used in order to ease the pain?

A. We have standard analgesic shots in the hospital which are listed on the clinical sheets.

Q. Will you speak up so the jury can hear you?

A. This gentleman, after I had seen the patient re-

quired very little in the way of pain relief. He was unconscious. Prior to that this patient had received codeine.

Q. Any other drugs?

A. For the relief of pain?

Q. Yes, or any other purpose?

A. The patient was placed on antibiotics; he was not [fol. 157] given penicillin, but he was on the bug-killing drugs. He also received some medicine that tends to hold down fits or seizures and he received also intravenously vitamins and sugar.

Q. Was there any pain-killing medicine, besides the codeine, administered?

A. Codeine is all that is listed here.

Q. Do you know whether others were given?

A. I do not.

Q. At the time you saw the patient, and shortly afterwards, was he able to get up and about?

A. No, sir.

Q. You did not see him up and about?

A. I didn't see him up and about.

Q. Did you see him after the four day period—from the time you first saw him, did you see him many times after that?

A. Either I or Dr. Stuteville did.

Q. I am asking specifically about yourself. Did you see him?

A. Yes, I did.

Q. Is Dr. Stuteville a resident or interne?

A. He is a resident.

Q. And this other doctor who is listed on the report, is he a resident or an interne?

A. An interne.

Q. Now, you say you didn't see him after that?

A. Yes, sir, I did see him after that.

Q. How many times?

A. Our usual policy is to make the rounds twice a day [fol. 158] around seven a.m. and around four p.m., unless——

Q. Do you recall the extent of recovery after the operation that you performed?

A. Yes.

Q. And what was that?

A. Very slight. He responded slightly more to pain, he moved his extremeties, his arms and legs, but he was still comatose, or unconscious, and actually he improved very little after the operative procedure.

Q. Now, who assisted you in the operation?

A. Doctor Stuteville.

Q. Was anyone else assisting?

A. Just Doctor Stuteville and myself are listed here. (Indicating.)

Mr. Vigil: That is all. Thank you very much Doctor.

Redirect examination.

By Mr. Kane:

Q. Did arteriosclerosis have anything to do with the cause of death?

A. In our clinical opinion, no.

Q. Will you explain to the Court and jury what bronchial pneumonia means?

A. It is an infection or inflammation of the air tubes in the lungs.

Q. And were you able to determine what would cause this infection in the lungs?

A. It was our feeling this pneumonia was caused by the patient's inability to handle his secretions. We were [fol. 159] attempting in the methods we knew to clean and keep clean his lungs of using tubes, but in a patient who is unconscious, to expel secretions, or is not capable, many times these secretions accumulate and infection soon follows.

Q. Doctor, can you relate the bronchial pneumonia to the brain injury?

A. Well, if this man was not comatose, if this man had not lost all the reflexees, he certainly would have handled the secretions.

Q. Do you feel there is a direct relationship between the injuries and the brain injury?

A. I surely do.

Q. Was there a direct relation between the breaking of the jaw and the brain injury?

A. The breaking of the jaw could evidence that consider-

able force had been applied to the head and it is just an indication he had received an injury to the head, or a blow to the head.

Recross-examination.

By Mr. Vigil:

Q. Now, you have indicated here there were blows received to the jaw. Those blows to the jaw could have been just as well received underneath the jaw, could they not?

A. I am sorry.

Q. The blows to the jaw could have been received maybe [fol. 160] under the jaw or to the side of the jaw?

A. I don't know. I think the dentist would be able to place the stress of a f-acture of the jaw. All I can say was that a force had been applied to the jaw.

Q. You indicated this clot you operated for was an old clot. Is that correct?

A. Yes.

Q. And by an old clot you mean one that had been there for a period of time?

A. Yes, a period of time.

Q. For a considerable period?

A. I would say more than seven days.

Q. More than seven days.

Thank you very much, Doctor.

Mr. Vigil: That is all.

Mr. Kane: No further questions.

(Witness cautioned by the court and excused.)

(Thereupon, a recess was taken to 2:00 o'clock p. m.)

Afternoon Session 2 p. m.

In Chambers Out of the Presence of the Jury

Mr. Rossman: I would like to make a motion, that the rule of inclusion having been invoked, we ask leave of Court for permission to have Doctors Rymer and Cohen permitted to sit in the court room during the course of any testimony they desire, and particularly with reference to

the statements of the defendants, if and when they are offered and testimony had concerning them. I think the [fol. 161] sole basis for the rule of exclusion is so witnesses cannot accumulate testimony, or get certain ideas concerning certain testimony; but here we are dealing with psychiatrists bound by the Court and under constant authority of this Court, and we would like to have that permission at this time.

Mr. Vigil: We have already made our objection to the use of these doctors, and regardless of the theory of the prosecution that they are court witnesses, they are not. Our position is that these doctors have a confidential relationship with the boys. And, furthermore, the rule of exclusion excludes all witnesses, so it is wholly improper to permit two witnesses to remain that the prosecution wants.

We certainly would object, and object very strenuously to any other witness other than the one sitting in the court room, apparently to advise with them during the progress of this trial. I think it is improper.

Mr. Rossman: If that is Mr. Vigil's position, then we object to the parents of these children being in the court room.

The Court: As far as this motion is concerned, one of the issues in this case is are the defendants, because of their age, able to distinguish good from evil. That is a material issue in the case. It isn't just a simple matter of some psychiatric testimony. I do not think they should be permitted to sit there.

The motion is denied.

Mr. Vigil: If the Court please, I want the record to show that Dr. Karl Arndt is the doctor we have selected to look [fol. 162] at these notes and I would like him to have them at the conclusion of the case this evening to look at them.

Doctor, will you be responsible for the return of the record to this court?

Doctor Arndt: I will.

The Court: Dr. Arndt, these are in the custody of the Court.

Dr. Arndt: I understand.

The Court: Be sure you return them by 9:30 Monday morning, and you may have them at the conclusion of court this evening.

IN THE PRESENCE OF THE JURY

Mr. Kane: If the Court please, I would like to recall Dr. Pollay.

Mr. Vigil: We object to the recalling of this witness. He has already testified and the prosecution has questioned him fully, and now they are seeking to recall the same witness. I think it is improper to do so.

The Court: I will let them recall him and you can cross examine.

Mr. Vigil: We do not know what the purpose of recalling this witness is.

The Court: I see no objection to it. You may recall him.

Mr. Vigil: Note our exception.

[fol. 163] MICHAEL POLLAY, recalled for further examination, having been previously sworn, on oath testified as follows:

Redirect examination.

By Mr. Kane:

The Court: Let the record show the witness has been heretofore sworn.

Q. Doctor, I believe you stated this morning, with reference to the blood clot, that it was about seven days old. Is that correct?

A. Yes. At the time of surgery, of course, that it was.

Q. When was the time of surgery?

A. I believe it was the 14th.

Q. The 14th of what?

A. Of January.

Q. The 14th of January, 1959?

A. Yes.

Q. And I believe you stated the injury occurred on the 20th of December, 1958?

Mr. Vigil: I believe the Doctor would not know that. We object.

The Court: Objection sustained.

Mr. Kane: I stand corrected, your Honor.

Q. Is it correct that on the 14th of January this blood clot was seven days old?

Mr. Vigil: He said it was more than seven days old——
The Court: Ask him how old it was.

Q. Can you estimate how old the blood clot was at the time of surgery?
[fol. 164] A. It was my feeling it was more than seven days old.

Mr. Kane: I have nothing further.

Recross-examination.

By Mr. Vigil:

Q. Doctor, was that operation you performed which you are referring to now the first operation or the second operation?
A. That was the first one.
Q. It was the first one. And actually this morning then you didn't know how old this blood clot was?
A. I am sorry.
Q. You didn't know how old this blood clot was this morning?
A. This morning I was asked and I said it was a minimum of seven days, I believe that was my statement.
Q. Do you know when the other operation was performed?
A. I believe it was nine days, approximately, after the first procedure. I am not certain of the number of days.
Q. Then yours would have been the second operation?
A. No, the first surgical procedure performed on this gentleman I did, and the second one was performed by another physician approximately nine days after mine, not the 9th day of the month.
Q. Are you a competent, qualified neurosurgeon elected to the American College of Surgeons?
A. No, I am not.
Q. Men who perform operations on the brain are neurosurgeons, are they not?
[fol. 165] A. That is correct.
Q. If they are members of the American College of Surgery, what does that mean?

A. That means they have completed the academic program and have had a number of years in practice.

Q. What is the academic program that is required?

A. This varies considerably. It usually is a minimum of three years of formal training——

Q. That means college work, does it not?

A. No, sir, that means postgraduate education in a medical center. This is after one has completed medical school and a year of internship.

Q. Then you have three more years formal training to take?

A. Well, approximately.

Q. And then you must have a specific number of operation in neurosurgury to become a member of the American College of Surgeons?

A. There is a minimum number of procedures and a minimum number of years.

Q. Do you want to refer to your notes again and see if the date of the operation is not incorrect?

A. I would like to, yes. I was incorrect. The second operation was on the 14th, mine was nine days prior to this, on the 5th.

Q. What date was this?

A. 1/5/59, and the second operation was 1/14/59.

Q. That is January, is it not?

A. That is correct.

[fol. 166] Mr. Vigil: That is all.

Mr. Kane: No further questions.

(Witness cautioned by the Court and excused.)

DWAINE D. KURTZ, called as a witness for the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Kane:

Q. Please state your name.
A. Dwaine D. Kurtz.
Q. What is your occupation or profession?
A. I am a dentist.
Q. And by whom are you employed?
A. Denver General Hospital.
Q. How long have you been so employed?
A. Since July 1st of last year, 1958.
Q. And what are your educational qualifications that equip you for this position?
A. Do you mean my degree?
Q. Yes.
A. I graduated from the University of Kansas City Dental School.
Q. Do you have a degree in dentistry?
A. I have, and a Bachelor's degree.
Q. Did you have occasion to examine one Robert F. Smith?
A. Yes, sir.
Q. Do you recall when you examined him?
A. It was on the evening of December 20th.
[fol. 167] Q. And did you arrive at any diagnosis as to his injuries?
A. When I looked at the X-rays I diagnosed, myself, three fractures of the mandible, which was later confirmed by the radiologist.
Q. Can you indicate to the Court and jury the location of these fractures?
A. He had two fractures of the body of the mandible, which is the part that contains the teeth on the right front that would have been, and he also had one in the back teeth in the molar region.
Q. Were you able to arrive at any opinion as to what caused these injuries?
A. We could not. Because of Mr. Smith's deafness we were not able to communicate with Mr. Smith.

Q. I mean, from your examination what would it be consistent with?

A. It would be consistent with trauma, a blow.

Q. Did you treat Mr. Smith?

A. On the evening he came in, we treated him. He was bleeding quite badly from the mouth and had a great deal of blood, or hemmorrhage, in his mouth, and after we cleaned out his mouth there was a break in the gums, I guess you would say on the left side, that we then sewed up for him that night, and then, of course, on being put in the hospital on an injury of this type there is always a matter of bleeding where the injury is at, and we ordered ice bags. That would reduce the bleeding and swelling, and there are medications that were indicated in this case; and then on January 14th the fractures, or the jaw breaks, were sta- [fol. 168] bilized in the operating room.

Q. Were you present when these breaks were stabilized?

A. Yes.

Q. Exactly, what do you mean by stabilized, Doctor?

A. Of course, on the jaw bone, we are not able to put a cast on and since he didn't have any teeth we were not able to use the teeth to hold the jaw bone together. So it was necessary to put in wires, or pins, and we wired his jaw bone back into the original position.

Q. Was that the extent of your treatment, Doctor?

A. Yes, sir.

Q. Doctor, would you describe fully the appearance of Mr. Smith when you examined him on December 20, 1958?

A. Do you mean general appearance?

Q. General and specific, if you will, Doctor?

A. Well, of course, he was an elderly man and what, I would say, sort of unkempt; his personal hygiene was not too good and there was a great deal of bleeding from his mouth and in his mouth—say a clot of blood; he had a small cut on his chin and it was beginning to have some swelling. You could tell something had happened to his neck which was quite typical to a jaw fracture.

Q. Do you recall any other bruises or abrasions, Doctor?

A. No, I don't. That is a little out of my field.

Q. You didn't specifically examine him for abrasions, is that correct, Doctor?

A. None other than the oral condition. That is the medical man's field.

[fol. 169] Mr. Kane: No further questions.

Cross-examination.

By Mr. Vigil:

Q. Are you an oral surgeon, Doctor?

A. No, sir.

Q. Did you perform the operation that you referred to on the 14th of January, 1959?

A. No, sir.

Q. Who performed that operation?

A. Dr. H. C. Becker.

Q. Is he an interne or resident physician?

A. He is on the oral surgery staff and I believe he is a surgeon here in town.

Q. What was the condition of the deceased at that time?

A. Well, of course, he had the fractured jaw, he was bleeding—do you mean was he unconscious or conscious?

Q. Yes.

A. He was conscious and tried to co-operate. The big problem was that we had to talk very loud to him.

Q. Was he deaf?

A. Yes, apparently.

Q. So far as this operation was concerned, he was fully conscious and knew what was going on, is that right?

A. On the 14th?

Q. Yes.

A. No, sir.

Q. How did he try to co-operate, then?

A. Apparently we have misunderstood our time, I [fol. 170] thought you meant the first time we saw him, but that was on the evening I saw him in the emergency.

Q. I am talking about the date of the operation on the 14th of January, 1959?

A. Now I understand. At that time, of course, he could not co-operate.

The Court: Was he conscious or unconscious?

The Witness: He was unconscious apparently.

Q. Is it common procedure to operate on persons when they are unconscious?

A. That, of course—it was not my diagnosis to do the operation.

Q. It would not have been your diagnosis to do the operation?

A. Well, I don't have any opinion on that. His jaws were fractured, he was having another operation at the same time and while they had him unconscious I presumed it was a good time to do it.

Q. But you would not have recommended this operation at that time?

A. I thought it had to be done sometime and Mr. Smith was hanging on.

Q. Was there a considerable loss of blood as a result of this operation?

A. No,—how much do you mean by, "considerable?"

Q. I don't know——

A. On the other operations we have done I would say it was just the ordinary amount that is lost. There are not a great many arteries or blood vessels in that area [fol. 171] that are large, and those that do bleed are clamped off.

Q. In stabilizing the jaw of the deceased, what had to be done? Will you describe it so all of us can understand?

A. It was necessary, of course, to operate, he had three fractures, but the two in front were the ones that were stabilized and due to the muscle pull they can be pulled out of line. So it was necessary to open—we opened the jaw below the mandible, lined the jaw bones up, placed wires on each side of this fracture and tightened the wires until the bones are lined up properly.

Q. Now, will you show where the wires were placed by illustrating on myself, Doctor?

A. He had a fracture approximately here (indicating), so we would place holes in the bones, here, here, here, and here (indicating) which stabilized the bones. In a fracture the bones usually fit pretty good right on the break. On the other side it was further back on the mandible and the same procedure was done.

Q. And these wires that are used, what type of wires are they?

A. Stainless steel.

Q. Do you have to cut the jaw to put the wires in?

A. We cut the skin here and place a hole in the jaw bone with a drill.

Q. And you had to do that on both sides of the jaw?

A. Yes.

Mr. Vigil: Thank you, Doctor. That is all.

(Witness cautioned by the Court and excused.)

[fol. 172] GEORGE I. OGURA, called as a witness for the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. State your name, please.

A. George I. Ogura.

Q. And your profession?

A. I am a physician.

Q. Are you associated with the City and County of Denver in any particular function at the present time?

A. Yes.

Q. As what?

A. As coroner's pathologist.

Q. What is a coroner's pathologist?

A. A coroner's pathologist is one who performs autopsies on people who have died suddenly of violence or under peculiar circumstances and gives the cause of death.

Q. How long have you been so associated with the City and County of Denver?

A. Since August, 1947.

Q. What background do you have medically, Doctor?

A. I received my degree of Doctor of Medicine from the University of Colorado School of Medicine.

Mr. Vigil: We will admit the Doctor's qualifications, if the Court please.

Mr. Rossman: I would like the jury to hear the Doctor's qualifications.

The Court: You may proceed.

[fol. 173] Q. Go ahead, Doctor, please.

A. Following a year of internship, I took four years postgraduate in pathology at the University of Colorado School of Medicine. Upon completion of that training course I went into the employ of the City and County of Denver.

Q. And you have been employed ever since by the City and County of Denver?

A. Yes, except for two years leave of absence for military service.

Q. Now, you say you perform autopsies?

A. Yes, sir.

Q. Do you perform autopsies in your work with the City and County of Denver?

A. Yes, sir.

Q. What is an autopsy?

A. That is the examination of the remains of a person who has died for medical purposes to determine the result of injury or disease and to determine as closely as possible what caused this man to die.

Q. How many autopsies would you say you have performed within your employment for the City and County of Denver?

A. Several thousand.

Q. Did you have occasion to perform an autopsy upon one Robert F. Smith?

A. Yes, sir, I did.

Q. When and where did you perform that autopsy?

A. I performed the autopsy in the morgue of the City and County of Denver on January 27, 1959.

Q. Do you know when the deceased died?

[fol. 174] A. Yes, sir, on the 26th of January, 1959.

Q. Can you describe the deceased?

A. The deceased was an elderly man, he appeared to be about seventy-five years old. I was told that he was seventy-four years old. He was five feet six inches in height and weighed 117 pounds.

Q. Did you determine, Doctor, the cause of death?

A. Yes, sir, I did.

Q. Can you tell us what the cause of death was?

A. The primary, in my opinion, condition which this

man had was brain injury which led to the development of bronchial pneumonia.

Q. Will you describe the way you determined the primary cause of death?

A. There were evidences of surgery, surgical incisions on the scalp, and the primary thing in the brain was that the membrane covering the brain showed a thin membrane, it is a separate membrane which we associate with old blood clots; and I believe that the formation of this old blood clot on the inner surface of the membrane covering the brain caused accumulation of fluid. The brain was somewhat swollen. There were, in addition, two soft spots in the brain.

Q. What is that,—what does that mean?

A. That means these areas were degenerated. One was on the surface on the right side, one the front, and this was typical of old hemorrhages; another was in the central portion of the brain and it was a spot of brown discoloration which we associate with a variety of injuries.

[fol. 175] Q. How old would you say the blood clots were?

A. The blood clot on the membranes were consistent with several weeks duration.

Q. And this was at what time you made this finding?

A. At the time of death of this man.

Q. That was when, again?

A. It was approximately five weeks after admittance to the hospital.

Q. Was that consistent with injuries sustained some five weeks prior to death?

A. Yes, sir, it was.

Q. Doctor, reference has been made by you to bronchial pneumonia as a cause of death. Is that correct?

A. Yes, sir.

Q. Will you explain that to the Court and jury, please, how bronchial pneumonia could enter into the situation?

A. Whenever a person has any brain injury, his general functioning is greatly lowered and they are more susceptible to any infection. This man had evidence of brain injury, and I believe because of the brain injury his general condition was lowered to withstand any type of infection

and because of this the bronchial pneumonia developed and caused his death.

Q. In your opinion, except for the brain injury, would bronchial pneumonia have occurred?

A. There was one other complicating factor, but I felt the brain injury was the most important.

Q. What is trauma, Doctor?

A. Trauma, broadly speaking, is any injury.

[fol. 176] Q. Would you say the trauma had any effect in this man's death?

A. Yes, sir, I believe so.

Q. In what respect?

A. This man had a broken jaw, and that is the result of trauma.

Q. And trauma, is that a form of plain force?

A. Yes, plain force is a form of trauma.

Q. Yes. Did you sign the death certificate in this case?

A. No, sir I did not.

Q. Do you know who did?

A. Mr. William D. Aldridge.

Q. And who is he?

A. He is the Chief Deputy Coroner of the City and County of Denver. He is an attorney and he handles the administrative affairs of our office.

Q. From whom does he receive the information to affix to the death certificate?

A. In this case from me.

Q. Are you aware of the fact the death certificate shows the immediate cause of death is bronchial pneumonia?

A. Yes, sir.

Q. Is that inconsistent with your findings here?

A. No, sir, it is not.

Q. Will you explain to the Court and jury why bronchial pneumonia was the immediate cause of death?

A. It was my opinion in this case that if this man did not have the brain injury he probably would not have developed pneumonia at this time.

[fol. 177] Q. Now, the fact that bronchial pneumonia was listed as the immediate cause of death, does that indicate it was the primary cause of death?

A. I am not quite certain how to answer that. All I can say is that the primary injury was the brain injury

which led to the bronchial pneumonia which caused death.

Q. Doctor, did you examine this body for cause of death, for instance connected with hardening of the arteries?

A. Yes, sir I did.

Q. Did you consider that as a possible cause of death in this case?

A. Yes, that was the other complicating factor, which I referred to a moment earlier.

Q. Will you go ahead and describe the condition which you found with reference to the hardening of the arteries?

A. The heart was somewhat enlarged. However, there was no evidence of any other hardening of the arteries in the heart, and it was my opinion that this enlargement of the heart was probably a chronic high blood pressure type of condition and I didn't feel that this in itself was the major factor involved.

Q. Now, Doctor, did you note the presence on the deceased of a system of wiring in connection with the jaw bone of the deceased?

A. No, sir, I did not.

Q. Did you make a full and complete investigation of the deceased with reference to any possibility like that?

A. Yes, sir.

[fol. 178] Q. And you have already designated that the cause of death, in your opinion, was the brain injury?

A. Yes, sir.

Mr. Rossman: Thank you, Doctor. That is all.

Cross-examination.

By Mr. Vigil:

Q. Doctor, was there evidence of any occlusion?

A. Sir, any evidence of occlusion?

Q. Yes, sir.

A. Of what?

Q. In the brain, any of the parts of the body you examined.

A. I don't know what you are referring to.

Q. Well, a coronary occlusion, isn't that in the heart?

A. Yes, sir, in the blood vessels and heart.

Q. And you have the same type of occlusion in the brain, don't you?

A. Yes, sir.

Q. Was there evidence of any such occlusion in the brain or heart of the deceased?

A. There was no evidence of any occlusion in the heart, and the blood vessels in the heart were alright and showed no evidence of disease except for a few small flecks which occur in hardening of the arteries. In the brain there were also some flecks which did not cause any occlusion. There was some on the membrane covering the brain, but there was no evidence of any injury beyond that point.

Q. Did you notice where the brain had been operated on?

[fol. 179] A. There were some clips in one spot.

Q. How many clips were there?

A. I don't remember how many there were; I believe there were about two of them.

Q. The occlusions you referred to in the brain, were they near this particular area?

A. Which area are you referring to?

Q. Where the clips were?

A. Yes, sir, that is the place where the smaller vessels were closed.

Q. Now, can you state what an occlusion is so that we can all understand it?

A. An occlusion is a complete blockage of any vessel, in the way we are using it.

Q. Is that similar to the rusting of a pipe on the inside?

A. It is more in terms of a blocked up drain that nothing can go through.

Q. And does this sometimes result in strokes or death?

A. Yes, sir, it can.

Q. And could you tell whether or not such an occlusion had occurred on this particular man, Mr. Smith?

A. Yes, sir, as I said earlier, there was no evidence of any injury to the brain beyond this place where the few blood vessels had been clipped.

Q. Now, of course, you stated with reference to this bronchial pneumonia, that in your opinion this bronchial pneumonia is one of the causes of death. Is that right?

A. Yes, sir.

[fol. 180] Q. Bronchial pneumonia can occur in anybody for many reasons, is that not true?

A. Yes, sir.

Q. And, of course, it might have occurred, and could have occurred without any blows of any kind. Isn t that correct?

A. In other cases, perhaps, but in this case I believe this pneumonia was secondary to the brain injury.

Q. But still, in making the death certificate, you gave the opinion that the immediate cause of death was bronchial pneumonia, did you not?

A. Yes, sir, but below that it says, "due to."

Q. Yes, of course there were other difficulties that this particular individual had, is that not true?

A. Yes, sir, that is correct.

Q. Now, he had many of the ailments of old age, did he not?

A. Yes, sir.

Q. You were speaking of the marks on the brain, and one of these clots, as I recall, you referred to as being old. How old would you say that was?

A. They were consistent with many weeks duration.

Q. You mentioned two of them, one was newer than the other one?

A. No, sir, I believe they were all fairly chronic.

Q. You indicated there was a marked difference in the coloration of these blood clots?

A. I don't think so.

Q. Were the blood clots two different colors when you [fol. 181] indicated one was older?

A. You may have misunderstood me. A blood clot near the base of the clot becomes gray because of the formation of scar tissue in the attempt of the body to absorb this clot.

Q. Now, the blood clots you indicated were several weeks old. Could they have been say ten weeks old?

A. No, sir, I believe not.

Q. Did the deceased have any evidence of arteriosclerosis?

A. Yes, sir, he did.

Q. How marked was that?

A. For a man seventy-four years old, it was surprisingly little.

Q. What is arteriosclerosis?

A. The common name for that is hardening of the arteries, and this is due to the deposition of some foreign material into the wall of the blood vessel with gradual narrowing of the inside until it becomes blocked eventually.

Q. Do you know whether a blood test was made on this man when he was first taken to the hospital?

A. No, sir, I do not.

Q. What other ills did this man have in addition to the arteriosclerosis?

A. He had this mild enlargement of the heart which I mentioned, and aside from that he didn't have anything of too great consequence.

Q. What was this enlargement of the heart called?

A. Hypertrophy of the heart?

Q. What causes this?

A. There are a variety of causes, but one of the most [fol. 182] common causes is an elevated blood pressure; there is also arteriosclerosis and defects in the heart which a person may be born with, and then there are other causes of enlargement of the heart.

Q. Can you state what the other causes of pneumonia are?

A. Any chronic ailment——

Mr. Rossman: I assume we are talking about bronchial pneumonia?

Mr. Vigil: Yes.

The Witness: Any chronic ailment of the body may lead to bronchial pneumonia. The important cause of bronchial pneumonia is some bacteria.

Q. You indicated you did not notice that the deceased had been operated on for stabilizing the jaw?

A. No, sir, I did not say that. I said I didn't see the wires that were used for stabilizing the jaw. There were incisional wounds on the inner surface of both jaws.

Q. What did you assume those were placed there for?

A. After I saw these wounds, I read in the chart this man had a broken jaw. So I went to the X-ray department and saw the X-rays which showed fracture of the jaws.

Q. So far as you were concerned, you used records that other people had prepared in arriving at your opinion, is that correct?

A. All medical records, yes, sir.

Q. And it was not solely from your examination, then, of the body of the deceased?

A. I felt with the presence of these incisional wounds

on the inner surface of the jaws, together with the X-rays, I could presume there was a fractured jaw.

[fol. 183] Q. The question I asked you was that in your examination of the deceased you used reports prepared by other people to arrive at your opinion?

A. Yes, sir.

Q. You had not been personally present when these reports were made?

A. No, sir.

Q. Or when the examination of the deceased had been made, that is, he was still alive when these examinations had been made and the reports prepared. Is that not correct?

A. But I talked with the people who made these examinations.

Q. You talked to them and they gave you information on which you based your opinion. Is that correct?

A. Yes, sir.

Q. Now, bronchial pneumonia, is that a virus pneumonia?

A. There is one such type of pneumonia.

Q. Do you know whether this particular individual had that type?

A. No, sir. Cultures which I took at the time of the autopsy showed the presence of large portions of staphyococci.

Q. Can you tell us what is chronic encephalomalacia?

A. Yes, that means just a chronic brain injury.

Q. A chronic brain injury?

A. Yes, sir, and by that I meant to include the small hemorrhage which was present on the surface of the brain and also the area of softening with brown discoloration in the central portion of the brain.

[fol. 184] Q. By chronic, you mean it has lasted a long period of time?

A. It was not fresh, I mean hours or days, it was weeks.

Q. And what does tracheobroncos acute mean?

A. That means the upper portion of the trachea tree and trachea and bronchi, which lead from the trachea to the lungs, were acutely inflamed.

Q. Now, the deceased had both of these conditions, did he not?

A. Yes, sir, that is considered just a part in the develop-

ment of bronchial pneumonia, especially in these mentally depressed people.

Q. And hyperemia, what is that?

A. That means the blood has just backed up into the rest of the body.

Q. And did the deceased suffer from that also?

A. I believe that was a terminal condition, that it happened just before death; that the heart had not stopped and the blood backed up before it stopped.

Q. Were you told about the craniotomy that was performed?

A. Yes, sir.

Q. Now, were you aware that there were two operations on the brain?

A. No, sir, I was not aware there were two operations on the brain.

Q. Now, the markings on the brain, does that indicate there was a blow on the jaw?

A. No, sir, but it was consistent with that type of injury.

[fol. 185] Q. To get a blow on the jaw?

A. Yes, sir, or somewhere from the front. This type hemorrhage which I mentioned present in the floor of the brain is one we associate with direct brain injury. There are two types, one due to the direct transmission of the blow through the brain and the other in the angle of the jaw and is secondary to the primary blow. This blow-type hemorrhage was present on the right side of the brain on the base, and medically my opinion is that this was in direct line with the force and that the other softening and brain discoloration in the central portion of the brain was also in direct line with this type of injury.

Q. I don't want a misunderstanding, are you saying the blow was to the jaw or to the skull in your opinion?

A. I believe it was more from the front. It would have to be to the jaw.

Q. Isn't that quite unusual for a blow on the jaw to result in any injury such as you have described?

A. No, sir, because a blow on the jaw, as we all know in boxing, is one of the major factors causing a person to have brain injury.

Mr. Vigil: That is all. Thank you, Doctor.

Redirect examination.

By Mr. Rossman:

Q. Doctor, the pathology which you performed in this case, did you do that yourself?
A. Yes, sir, I did.
Q. Is that the basis upon which you formed your opinion?
A. Yes, sir.

[fol. 186] Recross-examination.

By Mr. Vigil:

Q. As a matter of fact, you did say you had talked to other Doctors who made these reports?
A. Yes, sir.

Redirect examination.

By Mr. Rossman:

Q. Would you have ben able to form your opinion without talking to these other Doctors?
A. Yes, sir.
Q. Had you already formed an opinion before you talked with any other Doctor?
A. Yes, sir.
Q. Is that the opinion you have stated here in Court today?
A. Yes, sir.

Recross-examination.

By Mr. Vigil:

Q. Regardless of that, you did talk to the Doctors and did form your opinion after looking at the reports?
A. My primary pathology opinions are based on what I found, and my findings are entirely consistent with what was found by the others.

Mr. Vigil: That is all.
Mr. Rossman: I have no further questions.

(Witness excused and cautioned by the Court.)

[fol. 187] Mr. Vigil: If the Court please, we would like to move all the testimony of this witness be stricken because he testified he has taken the opinions of other people in arriving at his opinion. That is hearsay, and it is wholly improper in arriving at an opinion.

This is basically what we have a charge against two boys of murder in the first degree, or any degree, and to sentence them to life imprisonment in the penitentiary. The testimony should be stricken on that basis.

Mr. Rossman: We believe the evidence is proper. He has stated it was his primary opinion based on his own pathological examination, and that is the opinion he expressed here, and that it was corroborated by others.

The Court: The motion is denied.

Mr. Vigil: Note our exception.

Paul O. Chism, called as a witness for the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. State your name, please.
A. Paul O. Chism.
Q. What is your occupation?
A. Police officer for the City and County of Denver.
Q. What is your assignment?
A. Detective work out of the Juvenile Bureau.
Q. How long have you been so assigned?
A. Approximately four and a half years.

[fol. 188] Q. Were you so assigned during the period of time from December 20, 1958, and the 26th of January, 1959?

A. Yes, sir.

Q. Did you have occasion to participate in the investigation of the death of one Robert F. Smith?

A. I did.

Q. When did you first get the assignment?

A. We received the assignment December 22d approximately 8:30 a. m.

Q. In connection with your assignment and the investigation of this man's death, did you have occasion to come in contact with the defendants here in the court who are presently charged with murder?

A. Yes, sir.

Q. When and where did you come in contact with them?

A. January 1, 1959, at 19th and Curtis Street, approximately 8:00 p. m.

(Colloquy of Court and counsel at the Bench.)

The Court: We are going to have to take up certain points of law and the jury will go with the bailiffs, please.

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

Mr. Vigil: We have before the Court a motion to suppress the evidence, and also we would like to include the objection that we would make to the voluntariness of the statements that the district attorney undoubtedly intends to prove by the witness on the stand.

I think possibly the easiest way to proceed is to have him go ahead with his testimony in here.

[fol. 189] The Court: Your motion, as I read it, is to suppress any statements made by the defendants.

Mr. Vigil: We have an objection also as to the voluntariness, and I think we should proceed further with it.

Direct examintion continued in Chambers of the witness PAUL O. CHISM.

By Mr. Rossman:

Q. I believe, Detective Chism, we have your name and occupation in the record.

A. That is correct.

Q. And that you were assigned to the investigation of the case involving the death of one Robert F. Smith?

A. That is right.

Q. And in connection with that you came in contact with the defendants, Robert Elmer Gallegos and Edward Raymond Martinez?

A. Yes, sir.

Q. Will you identify the defendants?

A. Edward Martinez is sitting right in the rear of you and Robert Gallegos here (indicating). Eddie Martinez has the red hair and Robert Gallegos has the dark hair.

Q. When did you first come in contact with these boys?

A. January 1, 1959, approximately 8:00 p. m.

Q. Under what circumstances?

A. I was told——

Q. Just a minute, you are not entitled to go into any matters of any conversations you had with anyone other than the defendants. Do you understand that?

A. Yes.

[fol. 190] Q. Go ahead, then.

A. I was checking the area looking for the boys who fit the descriptions on the report and I located Robert and his brother Charles and his brother Richard at 19th and Curtis outside of the Dutchman's Inn, I believe it is called.

Q. What happened at that time?

A. I asked them to sit in the car and asked them regarding this offense. Richard immediately admitted the offense and Robert told me he was involved, too. Upon going to Juvenile Hall and questioning the boys there, Richard and Robert both told me that Charles was not involved, that Eddie Martinez, a cousin that lived at 4558 Mariposa was the boy that was with them.

Q. Then what happened, did you take Charles home?

A. That night I booked the two boys, Richard and Robert and took Charles home.

Q. Are you referring to one of the defendants?

A. Yes, Robert Elmer Gallegos.

Q. When you referred to Richard, are you referring to either of the defendants here?

A. No, sir.

Q. Who is Richard?

A. Richard is a brother of Robert's, I believe nine years old.

Q. Then what happened?

A. I returned to headquarters. It was late, I was due to go off shift and I left a note for the boys to pick up Edward.

Q. What happened then?

A. There was a note informing me to go to Juvenile Hall.

Q. Did you go to Juvenile Hall?

[fol. 191] A. Yes.

Q. When?

A. The same evening, approximately six o'clock.

Q. What happened?

A. In questioning the boys prior to this, there was another note attached to the one that I had that Eddie Martinez was in Juvenile Hall, that there was another offense that occurred at 18th and Champa and to also inquire if they were involved in that one.

Q. What happened then?

A. I proceeded to Juvenile Hall and the boys admitted to both offenses.

Q. Are you referring to the one involving John Kruhd?

A. Yes, sir.

Q. When you questioned the boys, did you question them together?

A. I questioned them separately at first and then together.

Q. Do you recall the statements either one made?

A. In receiving information from the boys together, one of them admitted their part in regard to both offenses. First of all, they discussed the one at 1851 Champa.

Q. That is the offense relating to Mr. Kruhd?

A. Yes, sir. Robert and Richard told me they were the ones that went upstairs and attacked Mr. Kruhd and Eddie stayed downstairs. Eddie verified this. Then after this offense, they said they went downtown to shine shoes and upon seeing Mr. Smith go down the street they followed him to the hotel. They didn't know what street it was on, [fol. 192] or the name of the hotel. Again, they said Richard and Robert followed Mr. Smith upstairs and losing him they inquired around to different parties that they were looking for their grandfather. One party told them one man just went back down the hallway and upon knocking on a door they told a man they were looking for their grandfather, that he had just come in and was drunk, and the man told them the man just next door had come in and it was probably him. Again, they said, Eddie stayed downstairs. Robert said he knocked on the door, someone told him to come in and when they opened the door he

saw it was the man they were looking for that he punched the man on the chin with his fist.

The Court: Who did this?

The Witness: Robert. And then he proceeded to get his billfold out of his rear pocket and left.

That was the first information I had from the boys. I have the information here.

I took Mr. Kruhd to Juvenile Hall where he identified Robert and Eddie as the boys that had assaulted him. I took Mr. Kruhd to Juvenile Hall 1/5/59 at 5:10 p. m. He identified Robert Gallegos as the one that held him and Edward Martinez as the one that struck him.

On taking Mr. Kruhd back to his hotel, I received a call to return to Juvenile Hall, that Robert and Eddie wanted to talk to me. I returned to Juvenile Hall and upon questioning them, Eddie was the first that told me that he was the one that struck Mr. Kruhd and that Robert held him. That he struck Mr. Kruhd with a shoe brush.

[fol. 193] He also told me after they followed Mr. Smith, he and Robert followed Mr. Smith upstairs and locating him in his room he asked for a drink of water, and when Mr. Smith brought it to him he grabbed Mr. Smith and Robert struck Mr. Smith with a shoe brush. Robert verified the information on both parties and added one other thing.

I told them that Robert stated one had a knife and I asked which one had the knife. Robert said he held the knife to Mr. Smith's throat while he reached in his pocket and got his billfold. He said after getting the billfold he told Eddie, "Let's cut out of here." He said Richard stayed downstairs. Both boys verified this. He said all three proceeded to the 23d Street Viaduct where they divided the money and threw the shoe brush and billfold over the viaduct. It was never recovered.

Q. Did they volunteer this information to you?

A. They did.

Q. Did you make any threats or promises to them in order to obtain any of this information?

A. No, sir, that is one thing I will never do with anybody.

Q. Did you do that in this case?

A. No, sir.

Q. At the time when this investigation occurred, had the deceased died at that time?

A. No, sir.

Q. Did you make an investigation to obtain information from Mr. Smith?

A. I kept checking with the hospital day in and day out [fol. 194] and they kept telling me he couldn't speak to anyone. I couldn't have obtained any information from him.

Q. You say they called you to Juvenile Hall after your original investigation?

A. Yes, they told the Clerk, or someone to call me.

Q. In other words, they requested you talk to them concerning this matter?

A. That is correct.

Q. Did you in any way threaten them?

A. Never.

Q. Did you tell them what they were being held for?

A. Yes, sir, I told them assault and robbery and possibly murder if the man died.

Q. Was it after you had told them all these things that they volunteered this information?

A. I told them right from the beginning after the night I picked up Robert and Richard and the next night after I picked up Eddie.

Q. After you had developed this information from them, what did you then do?

A. Well, at the time Mr. Smith was not deceased. I filed a report in Juvenile Court on assault and robbery.

Q. Did you subsequently attend a hearing in Juvenile Court?

A. I did.

Q. What occurred at that time?

A. I, myself, personally read the report, or complaint that I had sent to the court and upon finishing my information to the court Judge Gilliam asked the boys what [fol. 195] they had to say about it, and they admitted it.

Q. Were you personally present at that time?

A. I was.

Q. When did that occur, do you recall?

A. Right offhand I wouldn't know.

Q. That would be verified by the Juvenile Court record?
A. Yes.
Q. Were they personally asked by Judge Gilliam as to what happened?
A. Yes.
Q. And did you testify the same as you are testifying now?
A. I read my report and it is more or less the same information.
Q. At any time were their statements in any way changed?
A. No, sir.
Q. At any time did you use any threats or promises of rewards that would induce them to make the statements you have testified to?
A. No, sir.
Q. In each case were the statements of one corroborated by the other?
A. That is correct.

Mr. Rossman: That is all.

Cross-examination.

By Mr. Vigil:

Q. How many officers were present when you first approached these boys the first time?
[fol. 196] A. I was by myself.
Q. In a police car?
A. Yes.
Q. Were you in uniform?
A. No, sir, plain clothes.
Q. Did you tell them who you were?
A. Yes.
Q. And all you did was tell them you wanted to know about these things?
A. After I had them in the car.
Q. What made you think you could interrogate young boys like this without notifying their parents, or advising them they could talk to a lawyer?
A. What made me think I could?
Q. Have you always done this customarily?

A. I believe I had the right, yes.

Q. One of these boys was eight or nine years old?

A. Yes. I asked him about it.

Q. You asked him about it first and then you confronted the other two with this eight year-old's story. Is that right?

A. No, that is not correct. They were all three together in the car.

Q. And then you confronted the other boys with the story?

A. No, I asked all three and he was the first one to tell me and then Robert admitted it.

Q. The eight year-old told you the story and they were sitting right there?

A. They were sitting right there, they heard everything [fol. 197] he said.

Q. Did you reduce this to writing?

A. At that time in the car?

Q. At any time?

A. More or less, just notes.

Q. Do you have the notes—do you still have your notes?

A. I don't know whether I have them here. The rough ones are. This is my typewritten information (indicating) that I made on returning to the office.

Q. May I look at that?

A. This is the information that I took 1/2/59, 8:30 p.m. at Juvenile Hall from Robert Gallegos, Richard Gallegos and Eddie Martinez. Also it was taken in longhand and the boys signed it as being the truth.

Q. Do you have other notes?

A. This rough one, more or less to collect the information that I had sent to court. After Mr. Kruhd had identified the boys and I had returned to the Hall, I sent up additional information. This is just a short note that the boys told me that changed the information that went to the court.

(Thereupon, People's Exhibits A, B, and C were marked for identification.)

Q. Now, with reference to the statement that you have here (indicating), you first took the statement, as I understand you, of the eight year-old. Is that correct?

A. I didn't take any statement. I received the information, what he told me.

Q. Of course, he didn't just tell you, you had to ask him, did you not?

[fol. 198] A. Yes.

Q. And you showed this eight year-old your badge, is that right?

A. I never showed my badge, I told them who I was.

Q. Where had you found this eight year-old?

A. They were all three together.

Q. So you picked him out based on some description you had been given?

A. I picked up all three on a description I had been given.

Q. Did you tell them they had to get in your car?

A. I asked them to get in the car. I had the car parked across the street.

Q. Was it a police car with the insignia on it?

A. No, sir.

Q. Did you tell them you were a detective?

A. I did.

Q. What did you say to them, exactly, when you met them?

A. As I recall, when I parked my car across the street, I saw them at 19th and Curtis behind the Dutchman's Inn sitting beside the building. I parked my car and walked across the street and when I walked up to them I told them I was a police officer and that I would like to talk to them. I asked them if they would go across the street and sit in the car for a minute that I would like to talk to them, which they did.

Q. Did you take them by the arm?

A. No, sir, I never took them by the arm.

Q. Did you tell them they had to get in the car and go [fol. 199] with you?

A. No, sir.

Q. After they got in the car, where did you take them?

A. I took them to Juvenile Court.

Q. Where did you take them?

A. I took them to the admitting office of Juvenile Hall.

Q. Did they put them in solitary?

A. That I don't know.

Q. You know that is customary, don't you?

A. I know it is customary.

Q. How long do they keep them there?

A. Twenty-four hours.

Q. How lo. g did they keep these boys?

A. I don't know.

Q. They kept them five days, did they not?

A. I don't know.

Q. Did they question them there all five days while they were there?

A. I more or less—you have the information they had given me.

Q. You have here what has been marked as People's Exhibit A. This is a statement you stated had been written in longhand and apparently signed by all three of these boys?

A. Yes, sir.

Q. Do you contend this is a joint statement made by all of them at once?

A. They were all together.

Q. You don't take statements that way normally, do you?

A. No. That was just information, more or less, I wanted.

[fol. 200] Q. Normally, you take a statement from witnesses one at a time, do you not?

A. Normally, yes.

Q. In this case, instance, all three made the statement and all three signed it?

A. They verified it, each one of them.

Q. What I am trying to get at is the statement you have there is it the statement of all three or one of them?

A. Actually, it isn't a statement, it is information.

Q. Is it the information from all three, or one?

A. All three.

Q. So you combined it in one sheet?

A. That was more or less for my information to make my report.

Q. And the same thing is true of this other information that you have here which is marked People's Exhibits B and C, is that correct?

A. Yes.

Q. It is information from all three?

A. Except for the short note and that is just information from the two.

Q. You could not say which one of the two gave you the information?

A. I do know Eddie and Robert was the only ones there.

Q. That is People's Exhibit C?

A. Yes.

Q. So far as you are concerned then, this information is combined information from all three as far as Exhibits A and B are concerned, and Exhibit C is from two of them. [fol. 201] Is that correct?

A. Yes.

Q. And you couldn't say which one of these boys gave you the information?

A. Yes, I can.

Q. You can pick it out line by line?

A. I know exactly what happened on that short note.

Q. Yes, but I am not talking about the short note. I am talking about the information generally. Let's confine it to A and B. Can you pick out one line and say which boy told you that?

A. I don't believe I could pick it out.

Q. So, actually, the information here——

A. That is from my information to make the report.

Q. And you did make your report from this same information which you have here and filed with the Juvenile Court?

A. Yes.

Q. And they convicted the boys at that time?

A. Yes.

Q. And they were confined up to that time?

A. Yes.

Q. And the same information is the information you seek to present to this court?

A. More or less, yes.

Q. You are going to present exactly the same information?

A. I believe so.

Q. And you are going to use the same statements, the combined statements, of all three boys which you took in the investigating room?

[fol. 202] A. Yes, sir.

Q. With reference to the voluntariness, nothing was said

to them that the statements had to be voluntary and that they could talk to their parents or lawyer, was there?

A. No, sir.

Q. You never told them anything except you were a detective and wanted to investigate the matter?

A. I explained the situation and told them exactly why I wanted to talk to them.

Q. And the first one was the eight year-old boy and his brother sat there and later verified it?

A. Yes.

Q. How much later did you get Eddie Martinez?

A. He was picked up the next day.

Q. Was he also taken to Juvenile Hall before you questioned him?

A. Yes.

Q. Who was with you when you picked Eddie Martinez up?

A. I didn't pick him up.

Q. Who did?

A. I don't know.

Q. So his statements are not included in Exhibits A and B?

A. Yes, they are.

Q. When did he make these statements?

A. The next evening.

Q. After they were in Juvenile Hall?

A. Yes.

Q. You combined the statements though—you had been questioning them and you combined the statements?

[fol. 203] A. No, after Richard told me what happened, when he admitted they were the boys, then Robert verified that.

Q. And Richard is the eight year-old?

A. Yes, sir.

Q. And then Robert, his brother, said this was so?

A. Yes.

Q. Who was the third boy in the car?

A. Their brother Charles.

Q. What did Charles have to do with it?

A. When we took him to Juvenile Court, Robert told me he didn't have anything to do with it, that Eddie Martinez who lived at 45th and Mariposa was the one that was with him.

Q. How old is Charles?

A. I believe he was twelve.

Q. So, nothing was done with Charles except to question him?

A. I took him back home.

Q. What was done with Richard?

A. He was held.

Q. In Juvenile Hall?

A. Yes, sir.

Q. So, you questioned all three on the day you made the first statement?

A. Yes.

Q. Is this (indicating) the first statement you made?

A. That original was my own information. I would never send that to court.

Q. But this is the information you took from all three and had all three sign it?

A. Yes.

[fol. 204] Q. And then you took more information?

A. I believe if you will check the heading you will find that is January 1st.

Q. And this is the second (indicating)?

A. Yes, sir.

Q. So this was the first information?

A. Yes, sir.

Q. That you took from all three, though that was the first day they were at Juvenile Hall?

A. No, that is from Richard, Robert and Charles the night I picked them up.

Q. That is People's Exhibit B. People's Exhibit A is on the second day of January, and this is from three different boys. Is that correct?

A. That is correct.

Q. This is Robert Gallegos, Richard Gallegos and Edward Martinez?

A. Yes.

Q. And Richard is not charged with anything, is that correct?

A. No, sir.

Q. He is the eight year-old?

A. Yes, sir.

Q. Now did you take other information in addition to this information that we have marked here?

A. From the boys?

Q. Yes.

A. Just that short note for changing the report I more or less sent this report up to Juvenile Court.

[fol. 205] Q. The short note you are talking about is People's Exhibit C, is that right?

A. Yes, sir.

Q. This is the report that you are talking about that you sent to the Juvenile Court (indicating). Do you have a copy of that?

A. No, sir, I didn't bring that with me.

Q. Where is that report?

A. It is over at the office.

Q. And that report consists of what information?

A. More or less the information that is in that (indicating).

Q. In this (indicating)?

A. Yes.

Q. Were there other statements combined in that?

A. Well, we don't necessarily have a statement to Juvenile Court, it is more or less information as to what happened, which is a combined report, you might say.

Q. Did you take any other information from these boys, or any one of them?

A. Only on the short note and changed the report the way the boys told me at the time.

Q. In any event, the report made to Juvenile Court is based on these statements, is that correct?

A. Yes, sir.

Q. And is there any additional information in the Juvenile Court report that is not contained in these statements marked People's Exhibits A, B, and C?

A. I don't believe so.

[fol. 206] Q. Did you have signed statements that were taken by you?

A. I didn't take them.

Q. But there were some taken?

A. Yes.

Q. Are they available?

A. I have a copy.

Q. May I see that?

(Paper handed to counsel.)

(Thereupon, People's Exhibit D was marked for identification.)

Q. Now, with reference to this written statement, which is apparently dated January 7, 1959, who took this statement?

A. Sergeant Miller.

Q. Where was this taken?

A. I believe it was taken at Juvenile Bureau. I am not sure on that.

Q. Was this also used in the proceeding before the Juvenile Judge?

A. No, sir.

Q. Was it evidence that was seen by all three of them, or rather I should say statements presented by all three of these boys, this statement marked People's Exhibit D?

A. I believe so.

Q. How many times were they questioned by someone else before these statements were taken?

A. You mean altogether from the time they were picked up?

Q. Yes.

A. I couldn't say. All I know is the fact that I inter- [fol. 207] rogated them and Sgt. Miller took the statement. Of my knowledge now I don't know.

Q. This statement was taken January 7th?

A. Yes.

Q. Have you read this statement?

A. I have looked over it.

Q. And this is substantially the same statement that you took. Is that not so?

The Court: Let him look at it.

Mr. Rossman: Sgt. Miller is here and he can be called as a witness. I don't think this witness is competent to testify.

The Court: This man didn't have anything to do with it?

The Witness: I had only one thing to do with it, I took it out for them to sign it. This is more or less the same information I have in mind.

Q. With reference to that statement, you indicated you took it out to have it signed by the boys?

A. Yes, sir.

Q. Were you alone?

A. Detective Riggs was with me.

Q. Did you both sign as witnesses?

A. Yes, sir.

Q. So actually you were not present when the statement was taken?

A. No, sir. I made that statement a little bit ago that I was not present.

Q. You have a statement attached to this of all three boys,—"I certify I have read the above statement and have [fol. 208] signed it and the signature thereon is mine and this statement is entirely true. The statement was made voluntarily after I was duly warned by Sergeant Miller that it could and may be used against me in court. There were no promises made to me or threats made against me in obtaining this statement." And you have the signatures of these boys down below here (indicating). Apparently there are four signatures on there.

The Witness: Richard was unable to write his name, it is all the way out, so he put his last name down below here (indicating).

Q. So far as you are concerned you know nothing about the making of this statement or the reading of this statement, do you?

A. In what way do you mean that, sir?

Q. Here is this statement. It says, "I have read the above statement." You know nothing about that, do you?

A. Yes. They read the statement, then signed that, and then read the bottom part and signed that as being true.

Q. Each one of these boys read this statement?

A. Yes, sir. I would like to correct that. Eddie tells us he couldn't read and Robert read it to him, the whole thing, and he verified it.

Q. But that is not what you have on this affidavit, is it, that it was read to him?

A. No, I don't.

Q. It says, "I have read the statement." That is wholly misleading, isn't it?

A. It is under those circumstances, yes.

Q. This is very serious. Here are two boys being charged [fol. 209] with murder, subject to being sent to the peni-

tentiary for life. This statement was taken previous to this time on the 7th and apparently it was signed in a sort of haphazard manner. Is that correct?

A. No, I wouldn't say so.

Q. First of all, you have an eight year-old who didn't read this statement, did he?

A. Yes, he——

Q. Can this boy read?

A. No, sir.

Q. Can this boy Robert read?

A. Yes, sir, he can read good.

Q. And your statement, your statement signed by all three of them, and your statement, this one isn't signed, the first one, the second one that was marked as People's Exhibit A signed by all three of them, there is no indication that there was anything said to them about the voluntariness, is there?

A. I would like to correct that. That is not a statement, that is my own information and my own information only.

Q. Well, it is information but there is nothing in here relating to any knife, is there?

A. No, sir.

Q. There is no information in People's Exhibit B relating to any knife, is there?

A. No, sir.

Q. Nor in People's Exhibit C?

A. No, sir.

Q. Nor in People's Exhibit D?

[fol. 210] A. That I didn't notice.

Q. So far as the information you have here before the Court, you are elaborating on it by saying there was additional information given to you that you did not put into this information sheet, as you call it, is that correct?

A. To that extent, yes.

Q. Were there other items you were told that you didn't put into the information sheet?

A. Not to my knowledge.

Q. That is the only item you can recall?

A. Yes, sir.

Q. Except for that one item, these information sheets are complete?

A. It is complete to the extent that that is the informa-

tion that I made the report for the Juvenile Court from and I feel everything is included but that one fact.

Q. In Juvenile Court, did you charge all three of these boys, including the eight year-old?

Q. I sent the information up on Richard, too.

Q. But he wasn't charged, was he?

A. No, sir.

Q. And, actually, he was involved in this, was he not?

A. That is correct.

Q. He is in the proceedings according to your statements?

A. Yes.

Q. And you had him sign the statement?

A. Yes, sir.

Q. Did you tell him nothing would be done to him if he told the truth?

[fol. 211] A. No.

Q. But nothing was done to him?

A. That is correct.

Q. So you have the statement of all three, and the only one you have signed is signed by all three of them. Isn't that correct?

A. That is right.

Q. One further thing. You say you didn't tell them anything with regard to the voluntariness of the statement, there was nothing about that?

A. No, sir.

Q. And you knew you had, first of all, a boy eight years old, possibly nine; you knew he was of a very tender age. You knew that, didn't you?

A. Yes, sir.

Q. And you knew you had a boy twelve years old, possibly eleven at the time. Is that correct?

A. Yes.

Q. And then the oldest one is fourteen years old?

A. Yes, sir.

Q. Didn't you think that was a type of information where they were entitled to the benefit of every right, including posibly talking to their parents and a lawyer?

A. They have that right.

Q. But didn't you think children of that age should be advised of their rights.

A. At the time this wasn't this serious.

Q. It was serious, because you have put it down as aggravated robbery, isn't that true?

[fol. 212] A. Let me correct that statement. It was serious, yes, but not as serious as it is at the present time. Mr. Smith had not expired, and I didn't feel at the time when the report went to court he would.

Q. As a matter of fact, the action taken at Juvenile Court was in the nature of a trial, was it not?

A. Yes.

Q. And they were committed to the Industrial School?

A. Yes, sir.

Q. You knew at that point that was as serious a matter as you have with children of this age, did you not?

A. Yes, sir.

Q. In spite of your feelings about this, when you first approached them nothing was said about the voluntariness. Isn't that true?

A. Yes.

Q. And nothing appears in the information sheets regarding voluntariness?

A. No, sir.

Q. So far as you are concerned, the only statement about the voluntariness is the typewritten statement at the end of the sheet which they all signed. Isn't that correct?

A. In writing, yes.

Q. There is nothing else?

A. That is right, but they give me their information freely.

Q. I understand that, but you understand, and you have done this for a number of years, isn't it true when you have children they fear and rarely will speak to a policeman?

[fol. 213] A. No, often when I stop the car they come up and talk to us.

Q. But they are not like a man fully of age and you have to get the information from a person cognizant of all his rights, isn't that true?

A. Yes, sir.

Q. You make a distinction with children, don't you?

A. Definitely.

Q. And you treat them on a different basis than men who are criminals, let us say?

A. Yes, sir.

Q. You just presumed you would run them through Juvenile Court and forget about it?

A. Let's not say, "forget about it." We have a certain procedure to follow, we have to file on them within a certain period of time, forty-eight hours; or we have to send a letter up requesting further time pending the finish of the investigation. But as far as forgetting them, no.

Q. When was it called to the attention of the parents these boys were arrested and taken to Juvenile Hall?

A. When I took Charles home.

Q. What time was that?

A. Well I was back to the Bureau by 9:30 and I picked them up approximately 8:00 p. m.

Q. In the evening?

A. Yes.

Q. What were they doing?

A. They were sitting at the corner of 19th and Curtis beside the Dutchman's Inn with a shoeshine kit.

[fol. 214] Q. Do you have that shoeshine kit at the Department?

A. Yes.

Q. What do you have in that kit?

A. A shoeshine brush.

Q. Where did you get that brush?

A. From a shoeshine kit that I received from Robert's mother at home.

Q. And you just went to Robert's mother and asked her to give you the shoeshine kit?

A. Yes, that is right.

Q. And you took that to the police station?

A. No, I took it to the Juvenile Hall. Robert took the brush out and Eddie identified it as being the brush that he struck Mr. Krulid with.

Q. When were the parents allowed to see the boys?

A. They have regular visiting hours. I don't have any jurisdiction over the Juvenile Hall at all. That comes under the jurisdiction of Judge Gilliam.

Q. I understand that. Do you know when they are allowed to see the boys?

A. Mondays and Thursdays, seven p.m. to eight p.m.

Q. What day of the week was it you picked up these boys?

A. Offhand, I think it was a Saturday night, but I am not sure.

Q. You don't recall the date when you picked them up?

A. I know when I picked them up, it was New Year's night, but as far as the days are concerned, I don't know.

Q. Do you know whether or not the parents were permitted to see them on Monday?

[fol. 215] A. Sure. I remember telling Mrs. Gallegos when I took Charles back what the visiting hours were.

Q. Did you take these boys down to the hotel?

A. No, sir, I did not.

Q. You didn't have anything to do with that?

A. No, sir.

Q. Do you know whether they were taken there?

A. They were at Juvenile Hall, as far as I know, from the time I picked them up.

Q. When you were questioning them you used an address, is that correct, street address?

A. 1229 18th Street—you mean as to the offense or what?

Q. Yes.

A. Yes, I used the address and also the name of the hotel.

Mr. Vigil: That is all. Thank you.

Redirect examination.

By Mr. Rossman:

Q. Where did you first learn of the existence of the shoe brush that you say was identified?

A. It was after I returned to the Hall from taking Mr. Kruhd back. Eddie told me about a shoe brush being used and I asked him where it was and Robert told me it was in his shoeshine kit at home.

Q. Then what did you do?

A. I returned to his home and took the shoe brush and the kit to Juvenile Hall where they identified the shoe brush as the one Eddie used.

Q. Is that in Mr. Kruhd's assault?

A. Yes, sir.

[fol. 216] Q. When you took Charles home, did you advise the mother of Charles as to where her other boys were?

A. Yes.

Q. Did she make any statements to you at that time?

A. Yes, I did.

Q. Did she make any statement to you as to their whereabouts at some other place when this incident occurred?

A. No.

Q. What was your conversation with her at that time?

A. I explained where the boys were, that is Richard and Robert, that I brought Charles back, that Robert told me Charles didn't have anything to do with it and Eddie Martinez was with him.

Q. Did you explain the details, the reasons why you kept the boys at Juvenile Hall?

A. Yes, as to the assault on Mr. Smith and also on Mr. Kruhd.

Q. Did she make any answer at that time?

A. She made the remark to me that she wanted help to get them straightened out.

Mr. Rossman: I have nothing further.

Recross-examination.

By Mr. Vigil:

Q. Is this the shoe brush there?

A. Yes.

Q. May I see that?

(Thereupon, People's Exhibit E was marked for identification.)

Mr. Rossman: Let the record show that the shoe brush [fol. 217] has been marked for identification as People's Exhibit E.

Q. Now, officer, in all the references to a shoe brush you have made reference to People's Exhibit E?

A. That is correct.

Q. With reference to this particular shoe brush, had anything been done to it?

A. Yes, I put my initials and the date on which I received it on it.

Q. Anything else?

A. I believe Detective Riggs has his initials on it.

Q. Has this been shown to anybody?

A. No, sir.

Q. I thought you indicated you had shown it to the boys at Juvenile Hall?

A. Oh, excuse me, I did show it to Eddie and Robert. They identified it as the brush that Eddie used on Mr. Kruhd.

Q. Now this statement that you have, or information sheets, are concerning two particular cases, isn't that right, one on Mr. Kruhd and one on Mr. Smith?

A. That is correct?

Q. And they are combined?

A. Yes, more or less.

Mr. Vigil: That is all.

Mr. Rossman: Nothing further.

The Court: Did you say that at Juvenile Hall you explained the whole thing to them?

The Witness: I explained the seriousness of it.

The Court: Was this before any statement at Juvenile Hall?

[fol. 218] The Witness: Yes, sir.

The Court: What did you tell them exactly?

The Witness: I told Robert, Richard and also Charles—that is when they told me Charles was not involved—I explained how serious it was, what it was for, that it was assault and robbery.

The Court: And did you say possibly murder?

The Witness: I told the mother that, as I recall, when I took Charles back home.

Mr. Rossman: That is all, Detective, thank you.

CHARLES W. MILLER, called as a witness for the People, having been first duly sworn, on oath, testified as follows:

Direct examination.

By Mr. Rossman:

Q. State your name, please.
A. Charles W. Miller.
Q. Your occupation?
A. Sergeant of Detectives, Denver Juvenile Police.
Q. Assigned to what department?
A. Assigned to the Juvenile Bureau.

(Thereupon, People's Exhibits F, G, and H were marked for identification.)

Q. In your capacity do you conduct investigations relating to juvenile offenses?
A. I do.
Q. In that connection did you have occasion to participate in the investigation concerning the death of one [fol. 219] Robert F. Smith prior to the time Mr. Smith died?
A. I did.
Q. And did you have occasion to come in contact with the defendants who are presently on trial here in this court?
A. I did.
Q. What did you do as a result of your investigation in this case?
A. As I say, I am a sergeant over there and I was aware this case was assigned to Detective Chism, and also I was aware of the fact Mr. Smith was in critical condition at the hospital, and on the morning of the 7th, at approximately 8:15 a.m.——
Q. (interposing) Is that the 7th of January, 1959?
A. Yes. I received a call from Capt. Zarnow—let me clarify this—they handle homicides, we don't, and we merely inform them if there is a possible case pending. He called me and informed they had a call that a Mr. Smith was in critical condition and that he desired we obtain more statements from the suspects.
Q. At that time did you know who the suspects were?
A. Yes, sir.

Q. Did you have occasion to come into personal contact with the suspects?

A. I had personal contact the evening prior to this, I think it was January 3d.

Q. Did you discuss this matter with the two boys at that time on January 3d?

A. I discussed the matter, I was at Juvenile Hall, and the officer at the Hall said that Richard Gallegos, that is [fol. 220] younger brother of Robert, desired to speak with someone, and he said, "I am glad you fellows showed up." And Richard came down and said he would like to tell me all about this. So I listened to Richard's version of the story. After Richard finished, I sent him back upstairs and I was sitting there in the office—Juvenile Hall is set up where there is a monitor in each room—Richard went back up. He was assigned in the same age group detention place that Eddie Martinez was assigned to and we were listening and I heard Eddie say, "What did you tell that guy?", and he said, "I wanted to tell him about this and get this part of it straightened out." At which time we heard a sob, and we ran up and Eddie was choking Richard. We pulled Eddie off Richard—the attendant was there with me—and I told him they better go separate them, and the next time I had contact with the boys was when I was directed by Captain of Detectives to go to Juvenile Hall and obtain a statement.

Q. I call your attention to what has been marked here for identification purposes as People's Exhibit D. Can you identify the exhibit?

A. Yes, this is the statement I took from the boys.

Q. Were there any threats or promises made to obtain that statement?

A. At Juvenile Hall, I told them——

Q. Just answer the question.

A. No, sir.

Q. Was it voluntary on the part of those giving you the statement?

A. It was.

[fol. 221] Q. Are the answers contained in the exhibit the specific answers to the questions directed to them?

A. To the best of my knowledge, they are.

Q. Are the questions which appear in the exhibit the specific questions which you directed to the boys?

A. They are.

Q. What conversation did you have with them concerning the taking of the statement?

A. After receiving the call from the Captain of detectives, I proceed to go to Juvenile Hall where I called Eddie, Robert and Richard down, and at that time I explained to them that Mr. Smith was in a critical condition in the hospital and the possibility was he would not live. I told them I was instructed to take a statement and if they wanted to give me statements, that I was there, if they wanted to make them, to obtain them from the boys. I explained if they wanted their parents to come with them it would be fine, and if they wanted an attorney it would be fine, and if they didn't want to make the statements they didn't have to, and I said, "If you want to get this whole thing straightened out, I want you to tell me the truth about the matter," and they said they would.

Q. You had previously given them the opportunity to get counsel or have their parents there?

A. I told them if they wanted an attorney, or to have their parents there, it would be fine.

Q. Did they ever request an attorney or to have their parents present?

A. They did not.

[fol. 222] Q. Did they make this statement, then, voluntarily?

A. They did.

Q. Did you extend to them any hopes of any kind in the event they gave this statement?

A. I did not.

Q. Did you suggest any of the answers?

A. I am not an expert statement detective. I did take the statement to the best of my ability, and whether I led them or not, I don't know. If I did, it was not intentional.

Q. You let them tell just what happened?

A. I asked them for their story of that night.

Q. After the statement was taken and reduced to writing in its present state, did you examine it?

A. They were returned shortly before I went off shift, as I say. It is a standard form that the stenographer uses on all statements. In all cases we had to borrow the stenographer that is in the Detective Bureau to come and take statements, and I examined it and those are the words and

expressions used by the boys and myself in obtaining the statement.

Q. Then it is correct in all particulars to the best of your knowledge?

A. To the best of my knowledge, as I say, when the boys signed it——

Q. We are not concerned with that at the moment. You were not present when it was signed?

A. I was not.

Q. Did you delegate that duty to someone else?

A. Detective Chism was originally assigned to the in-[fol. 223] vestigation. When she appeared in my office shortly before I went home and when Detective Chism appeared, I handed them to him and told him that was what I was to obtain and I asked Detective Chism and Detective Riggs to take it to them.

Q. Exhibit D is not ing more than a copy of the original, is that right?

A. Yes.

Q. And the original in this case is in the possession of the district court to the best of your knowledge?

A. To the best of my knowledge.

Q. Just, again, to clarify the record, Sergeant, I will ask you to look at Exhibit D as it is presently marked, is that the original of the statement?

A. Yes, sir, this is the original of the statement as presented me by the stenographer of the Detective Bureau.

Q. Everything you have said about Exhibit D in your identification in your previous testimony is true about Exhibit D as it now stands?

A. That is correct.

Mr. Rossman: Let the record show we have marked the original of the statement as Exhibit D in lieu of Detective Chism's carbon copy which had been marked as Exhibit D in this matter.

The Court: Is it all right to substitute the original for the carbon copy?

Mr. Vigil: Oh, yes.

Q. Your name appears as a witness signed on this exhibit, is that correct?

A. It does.

[fol. 224] Q. Does that attest to the fact these are the questions and answers which were asked and given in the interrogation of these three boys at the time and place stated?

A. It does.

Mr. Rossman: That is all, thank you.

Cross-examination.

By Mr. Vigil:

Q. You were not present when these statements were signed?

A. I believe you will find my signature not as a witness to the signature of the boys, but to the entire statement that was taken. I was not present when the boys signed.

Q. That is what I want to clarify. You were not present when the boys signed this statement?

A. No, sir.

Q. So your signature is only to the fact you were present when the statement was taken?

A. That is correct.

Q. How many times had these boys been questioned by anyone before this statement was taken?

A. Mr. Vigil, I cannot give you a definite answer. As I say, one of the boys requested to speak to me——

Q. That was Richard?

A. Yes.

Q. He is eight years old?

A. Yes. He requested to talk to me one night. Detective Chism was handling the investigation.

Q. Did he call you directly?

A. He notified the attendant at Juvenile Hall that he [fol. 225] would like to speak to one of the detectives about this matter and, as I say, I happened to appear and they told me he wanted to speak to someone so I talked to him.

Q. He just wanted to speak to a detective about this matter. So then when you went to see Richard, just what did you say to Richard?

A. I asked Richard what he wanted to talk to me about.

Q. What did you say to him? Use the same words that you used to Richard.

A. I said, "Richard I am Sergeant Miller of the Juvenile Bureau, and I understand you want to talk to one of the detectives. I happened to be here. What did you want to tell me?"

Q. Were you alone?

A. No, sir, I was not.

Q. Who else was with you?

A. I don't recall. You see I work with various people.

Q. Was it a uniformed policeman?

A. No, it was another detective.

Q. Can you name a possibility of whom it might have been?

A. I would have to check my work log.

Q. All I want to know is was there only one other person with you?

A. That is correct.

Q. How many others came from the Juvenile Hall of the officers?

A. None. You see they are not employed as investigators.

Q. Were any of the attendants present?

[fol. 226] A. They were not.

Q. How long had these boys been kept in solitary?

A. I don't know.

Q. How long do they generally keep them?

A. Generally twenty-four hours.

Q. But your statement is dated January 7th, is that correct?

A. That is correct.

Q. And they had actually been arrested several days before that, six, seven or eight days?

A. That is correct.

Q. And they had been held in Juvenile Hall in solitary presumably, is that correct?

A. I don't believe we can presume they were held in solitary for twenty-four hours.

Q. They were even separated, were they not?

A. I don't know.

Q. They were not permitted to mix with the other boys at any time, were they?

A. I don't know.

Q. How many times would you say they were questioned before the 7th when you took this information sheet?

A. I spoke to one of the boys previous to obtaining their statements.

Q. Whom did you speak to?

A. Richard.

Q. That is the same night you took the statement, is that right?

A. No, this was prior to the statement.

[fol. 227] Q. When was that?

A. That was the evening of January 3d.

Q. When you speak of a monitor being in the room, does that mean you have the room "bugged", or a microphone in the room?

A. Yes.

Q. The boys didn't know that, did they?

A. They do now.

Q. It is a matter of a sort of trap so you can get the information?

A. And in some cases protecting and saving a life.

Q. That is not the primary purpose—the primary purpose is to gain information, is that right?

A. I don't know, we don't use them for that, we never have.

Q. You did on that occasion, did you not?

A. The attendant uses them.

Q. Nevertheless, on this occasion you did use the microphone, the bugging system, in order to get this information you have just told about?

A. The attendant had it on the small boys' unit where Eddie and Richard were.

Q. Did this attendant advise you of the other information they had gathered?

A. No.

Q. And the attendant told you you could listen?

A. You can hear it if you sit in the attendant's office.

Q. Have you done this previously?

A. I haven't, no—I will qualify that. When I was first shown through Juvenile Hall, I was shown that they have a [fol. 228] manual board and also an electric where they can switch it to every place in the office.

Q. So far as the written formal statement, Exhibit D,

when you started the questions you have for these boys, were they altogether or was Richard separate?

A. No, sir, I brought them all in and sat them in my office.

Q. When you talked to Richard, did you make notes?

A. No, we had the stenographer from the Juvenile office.

Q. She is not the one who took this—this statement is not the statement taken by the Juvenile Bureau, is it?

A. Mr. Vigil, let me clarify this. We, as a practice, do not obtain formal statements like this in the Juvenile Bureau. The Detective Bureau does and they have in their employ a full time stenographer. We don't. I had to go up there to get one of their stenographers.

Q. And bring her to the Police Building?

A. Yes. The only stenographers we have in the Juvenile Bureau are typists.

Q. In questioning Richard, did you take the statement down in writing, take notes on that statement from Richard?

A. Richard's statement appears in there.

Q. I understand that. But before you took this written statement, you talked to Richard, didn't you?

A. Yes.

Q. Then, you testified you let Richard go back and you listened over this microphone, or bugging system, and then you took a statement from all three boys?

A. That is correct.

[fol. 229] Q. This was not done in Juvenile Hall, was it, the taking of the statement?

A. Oh, no, sir.

Q. You brought them to the Police Building?

A. Correct.

Q. Did you bring all three together?

A. Yes.

Q. Before you brought them to the Police Building did you question them?

A. I talked to Richard, he wanted to speak to someone that night.

Q. What time in the evening was that?

A. I think it was just after lunch, around 6:15.

Q. Do you mean dinner?

A. Yes, it was dark.

Q. You talked to Richard and discussed with him what

he wanted to talk about and you said he told you something about this, which is substantiated in this written statement?

A. Yes, sir, and I left the note that Richard had wanted to talk to me and I gave it to Detective Chism.

Q. Now, that same evening you brought them all three to the Police Building?

A. No, sir.

Q. When did you bring them to the Police Building?

A. The morning of January 7, 1959.

Q. When did you talk to Richard?

A. The evening of the third.

Q. So, it was several days later you took the statement?

A. Yes, sir.

[fol. 230] Q. In the meantime several other officers had talked to these boys with regard to this statement, is that true?

A. I don't understand you.

Q. What I am getting at is, these boys were interrograted many times, were they not?

A. No. Detective Chism was handling the case, he is a qualified detective. He is the man who will have to answer that question.

Q. You were here when he testified?

A. Yes, sir.

Q. And he personally said he questioned them?

A. Yes.

Q. And you questioned them?

A. I didn't question anybody. He wanted to talk to me.

Q. You did question him, did you not?

A. No. I asked what he wanted to say. Those are the statements.

Q. And you questioned him, didn't you?

A. No.

Q. Didn't you ask him statements so he would give you the answers?

A. I believe that is self-explanatory.

The Court: I don't want to interrupt. You talked to Richard January 2d?

The Witness: Yes, sir.

The Court: Then what happened—is that when the incident on the microphone system occurred?

The Witness: Yes.

The Court: What occurred then—you say you heard [fol. 231] a sound?

The Witness: I heard Richard go back up into the small boys' unit.

The Court: Who was in there?

The Witness: Eddie Martinez was the only one—no there were other kids in there.

The Court: Then what happened?

The Witness: Well, as I say, we heard Eddie—the conversation was, "What did you tell that guy?" He said, "I told him the truth, I wanted to get the matter straightened out." And we heard someone say, "You brat," and we heard a scuffling sound, gurgling sound, and we ran up.

The Court: This wasn't when this statement was taken?

A. No, this statement was taken four days later.

(Questions by Mr. Vigil)

Q. When you were listening on the microphone and heard someone say this, you indicated it was Eddie Martinez, but you cannot swear he said this?

A. No, but I can say it was Eddie Martinez. He was choking Richard Gallegos when I ran up there.

Q. On the morning of January 7th when you decided to take this statement, you went out there and picked up all three of them?

A. Yes, sir.

Q. And did you go alone on that occasion?

A. No, sir.

Q. Who was with you then?

A. Lieutenant Gartland.

[fol. 232] Q. Anyone else?

A. No, sir.

Q. Was he in uniform?

A. No, sir.

Q. What did you tell these three boys?

A. As I previously stated, Mr. Vigil, I told them I was instructed to come down and get a statement from them if

they cared to make one; I told them if they wanted their parents to accompany them that they could; I told them if they wanted an attorney to accompany them, they could have that; and I told them if they didn't want to go with me, they didn't have to.

The Court: You told them they could have a lawyer and their parents go with them?

A. Yes, sir.

Q. Did you have them brought to the office or in another room?

A. It is in the main lobby of the Hall.

Q. Were other people present when you told them this?

A. Yes, there were other people around there.

Q. Who were the people that were there?

A. Lieutenant Gartland was with me when we picked the boys up.

Q. Was he present when you told them this?

A. He was present.

Q. Who else?

A. Whoever the attendant was that brought the boys down. I don't recall at this time.

Q. Was anyone else present?

A. Not to my knowledge.

[fol. 233] Q. Now, you had previously talked on January 3d to Richard because he had called you out there to talk to you. Is that correct?

A. That is correct.

Q. When you talked to Richard, did you tell him he didn't have to tell you anything, that he could have a lawyer or call his parents?

A. No. I asked Richard what he wanted to tell me.

Q. How do you explain the fact that Richard was part of this but was not charged?

A. I believe you know the state law, a boy under ten years old is incapable of committing a crime.

Q. So you didn't present anything against him in Juvenile Court?

A. I didn't present anything against anyone in Juvenile Court. Detective Chism filed these charges.

Q. So far as the statement is concerned, when you talked

to Richard on January 3d, you told him he could have a lawyer and have his parents there, did you not?

A. I merely listened to Richard.

Q. You didn't say this that you repeated on the 7th, did you? Did you tell Richard this on the 3d?

A. I am going to have to have it clarified.

Q. On the 3d did you tell Richard anything with regard to having a lawyer, seeing his parents, or making a statement?

A. No, sir. Richard wanted to talke to someone on the 3d.

Q. Now, this statement you have here is a joint statement—all three were present?

A. All three were present. They were advised if there [fol. 234] was anything wrong they could correct the testimony as it was being made.

Q. One thing further that appears in this statement, you indicate in one of the earlier questions as follows:

> "Q. All right, at this time Robert, I call your attention to Case No. 290463, wherein one Robert F. Smith, of 1229-18th Street, City and County of Denver, Colorado, was the victim of an aggravated robbery."

Did you explain to Robert what this case number meant?

A. I explained before we started I didn't want them to say anything about Mr. Kruhd; all I wanted to know about was the second man, and I explained that was the one in the hotel down on Larimer, not the one by the barbershop where the other offense occurred. In my mind I knew they knew what I was talking about.

Q. And you thought this case number was sufficient so that they would know?

A. No, sir.

Q. Is that the only explanation that was made?

A. No, sir.

Q. In other words, the reporter didn't take down the whole question?

A. When the boys were brought to my office, I explained to them, before the stenographer got there, that I wanted to stick with the second offense that occurred, the second old man, that occurred that evening, that the first man was out, all I wanted to know about was the second man.

Q. What is this case over, No. 290463?

[fol. 235] A. I believe you have a copy of the offense report.

Q. And that is what you were talking about when you asked this question?

A. I believe it goes on in there and says, "Mr. John Smith."

Q. I read that through, it says, "Robert F. Smith."

A. It says, "Case No. 290463, wherein Robert F. Smith was the victim of aggravated robbery."

Q. And you made no further explanation of the case other than what you have stated you explained to them prior to the questioning?

A. That is correct.

Mr. Vigil: That is all.

Mr. Rossman: So far as our offer of evidence is concerned, perhaps it is premature, but we will offer into evidence People's Exhibit D.

(Thereupon, a recess was taken to 10:00 o'clock a.m. Monday, June 15, 1959.)

[fol. 236] Monday, June 15, 1959 10:00 am.

Court convened pursuant to recess.

Appearances as heretofore noted.

And the following proceedings were had, to-wit:

Out of the Presence of the Jury in Chambers

Paul O. Chism, recalled for further examination, having been heretofore duly sworn, on oath testified as follows:

The Court: Let the record show the witness has been sworn, and you understand you are still under oath?

The Witness: Yes.

Redirect examination.

By Mr. Rossman:

Q. Will you state your name?

A. Paul O. Chism.

Q. You are the same Paul O. Chism who testified in this matter heretofore?

A. I am.

Q. Now, with reference to your testimony as given, can you state whether or not other police officers interrogated these boys or talked to them prior to your doing so?

A. No, sir, I have no knowledge about that.

Q. You have no knowledge of that. You mean to state, then, that it happened by sheer accident that you happened to approach these boys on the date that you did?

A. Yes, sir.

Q. Were you approaching all the children that you met?

A. Yes, sir, they were all three together.

[fol. 237] Q. I know, but had you been approaching any child you met in that area?

A. No, sir, I had not.

Q. You hadn't had any information concerning these particular children at all, then?

A. Yes, I did.

Q. From other police officers?

A. Yes, sir, and also made inquiry of somebody in the shoeshine business.

Q. Who was that?

A. His name is Schalbreck.

Q. What did they tell you about it?

A. They told me they had information that three boys fitting the description on the complaint hung around the Fun House at 19th and Arapahoe.

Q. Now, what kind of a gun holster do you customarily wear?

A. A shoulder holster. I have a holster on the side (indicating).

Mr. Vigil: Will you have the record reflect that the officer indicated a holster along the side of his belt on the left side.

Q. And are you required under the rules of the Police Department to always wear your gun?

A. Yes, sir.

Q. No matter where you go, is that correct?

A. Yes, sir.

Mr. Rossman: No further questions.

Recross-examination.

By Mr. Vigil:

[fol. 238] Q. Did you display your holster and gun to these boys?

A. No, sir, I did not.

Q. Would it be necessary for you to remove your coat to get to your gun?

A. Remove my coat or open my coat.

Q. Was this done in this instance when you were interrogating these defendants?

A. No, at no time.

Redirect examination.

By Mr. Rossman:

Q. You couldn't say these boys couldn't see your gun, could you?

A. I feel in my own mind they couldn't.

Q. But they might have without your knowing it?

A. That is possible.

Recross-examination.

By Mr. Vigil:

Q. In regard to other officers interrogating the defendants, were you in charge of this case?

A. Yes.

Q. Would anyone have interrogated these boys prior to your first interrogating them on January 1, 1959?

A. Not to my knowledge.

Q. Did you assign anyone to interrogate them?

A. No, sir.

Q. To your personal knowledge did anyone interrogate these boys—of your knowledge did Detective Miller?

A. Not to my knowledge.

(Witness excused.)

[fol. 239] CHARLES W. MILLER, recalled for further examination, having been heretofore duly sworn, on oath testified as follows:

The Court: Let the record show the witness has been sworn. Do you understand you are still under oath?

The Witness: Yes, sir.

Redirect examination.

By Mr. Rossman:

Q. You are the same Charles W. Miller who testified in this matter heretofore?

A. I am.

Q. With reference to the testimony you gave heretofore, can you state whether or not other officers had questioned these two boys?

A. Not to the best of my knowledge. It is a policy when a man is assigned to a case it is his case and other people do not do any interrogation.

Q. Did the probation officer question them?

A. I have no knowledge of that, sir.

Q Did you appear in the Juvenile Court?

A. I did not, sir.

Q. What sort of a gun holster do you wear?

A. The same as Detective Chism, but on the right side.

Q. Yours is on the right side?

A. It is, sir.

Mr. Rossman: That is all.

[fol. 240] Recross-examination.

By Mr. Vigil:

Q. When you interrogated the defendants here present, did you display your gun or holster to the defendants?

A. For clarification, I didn't question any of the defendants.

Q. I believe that on January 7th you took a formal statement from these defendants, did you not?

A. I am sorry. Yes.

Q. Did you display your holster to these defendants at that time?

A. I did not.

Q. When you were talking to the nine year-old, named Richard Galiegos?

A. I did not.

Q. Did you indicate to him you were a police officer, did you show him your badge?

A. I told the boys when I went to Juvenile Hall that I was Sergeant Miller and told them Lieutenant Gartland's name, who was with me.

Redirect examination.

By Mr. Rossman:

Q. Was Lieutenant Gartland present when you interrogated the nine year-old boy?

A. Mr. Gartland accompanied me to the Hall. He was present when I questioned the boys. He was present when the statements were taken.

Q. While he was in your presence did he display a gun [fol. 241] in front of the defendants in any manner?

A. Not to my knowledge.

Q. You were present, you didn't see it?

A. No, sir.

Recross-examination.

By Mr. Vigil:

Q. You indicated there was a scuffle you overheard over the monitor system, this microphone system they have out there, and that you had gone upstairs. Is that where this was?

A. That is where it happened in that small boys' unit. They separate them to small boys and large boys.

Q. These boys were in the small boys' unit, is that right?

A. I don't make the assignments at Juvenile Hall, but if they fall in a certain age group. Eddie and Richard were in the small boys' unit because of their age.

Q. Did you go upstairs when you heard this scuffling?

A. We ran up there, the attendant and I. The attendant yelled over the monitor system, "There is something wrong up there," and we ran up.

Q. And when you got up there, what did you do to Eddie?
A. We got him off of Richard.
Q. How did you do it?
A. We pulled him off.
Q. Did you hit him?
A. No, sir.
Q. Just grabbed him?
A. Just grabbed him and pulled him off.
[fol. 242] Q. Both of you?
A. The attendant and myself and another attendant that appeared approximately the same time we did.
Q. Then what did you do?
A. We said it would be a good idea to keep these boys apart.
Q. Did you help them in a room?
A. I didn't help them in a room, no, sir.

Mr. Vigil: No further questions.

Robert Elmer Gallegos, a defendant herein, called as a witness in his own behalf, having been first duly sworn, on oath testified as follows:

The Court: Robert, do you understand the meaning when you take the oath?
The Witness: Yes.
The Court: What is your understanding of taking an oath?
The Witness: I have to tell the truth.
The Court: Do you understand if there is any penalty connected with it if you do not tell the truth?

(No response.)

The Court: Do you know what would happen to you if you do not tell the truth?
The Witness: Yes.
The Court: What do you think would happen?
The Witness: They would find me guilty if I didn't tell the truth.
The Court: You understand you do have to tell the truth?
[fol. 243] The Witness: Yes.

The Court: And you understand if you do not there is punishment connected with that?

The Witness: Yes.

EDWARD RAYMOND MARTINEZ, a defendant herein, called as a witness in his own behalf, having been first duly sworn, on oath testified as follows:

The Court: Eddie, do you understand what it meant when you raised your right hand?

The Witness: I don't know.

The Court: Do you understand you are to tell the truth?

The Witness: Yes.

The Court: What do you think would happen to you if you don't tell the truth?

The Witness: I don't know.

The Court: Do you think it is wrong not to tell the truth?

The Witness: I don't know.

The Court: Do you know whether it is wrong, or not?

(No response)

The Court: Do you want to see if you can qualify him?

Mr. Vigil: I will be quite frank with the Court. It appears that this boy has a very low I.Q. and we can establish the fact he is a dullard.

The Court: What is his I.Q.?

Mr. Vigil: I think it is seventy-two, which is a very low I.Q. I will have to check that, if the Court please.

(Colloquy of Court and counsel off the record.)

[fol. 244] The Court: Eddie, do you know what it means to tell the truth or not tell the truth?

(No response.)

The Court: Do you know what we mean when we say you promise to tell the truth?

The Witness: No.

The Court: We will go ahead with Robert.

Direct examination.

Of the Witness Robert Elmer Gallegos.

By Mr. Vigil:

Q. Will you state your name?
A. Robert Elmer Gallegos.
Q. Where do you live, Robert?
A. 2654 Stout Street.
Q. Do you also go by the name of Bobby Gallegos?
A. Yes.
Q. Do you recall being approached by any police officers prior to your appearance in the Juvenile Court?
A. (No response.)
Q. Do you remember any police officer talking to you prior to the time you went to Juvenile Court?
A. Yes.
Q. When was the first time any police officer approached you?
A. At Juvenile Hall.
Q. At Juvenile Hall was the first time?
A. That is where they were talking to us.
Q. Do you recall an officer approaching you down on [fol. 245] 19th and Stout?
A. No, 19th and Curtis.
Q. Who was the officer that approached you there?
A. Detective Chism.
Q. And what was said, if anything, at that time by Detective Chism?
A. He just picked us up and told us to come to the car. He just told us—I thought he was going to take away our shine box from us, for shining shoes. He didn't tell me what we were going up for. He told us about the Juvenile Hall. He had talked to me first and said I had beat up some old man.
Q. What did you say?
A. I told him I had nothing to do with it; I told him I didn't know nothing about it.
Q. Did he tell you he had talked to Richard, that you had to tell him facts just as Richard had?
A. He told me Richard said we had done it, and then he started telling me here how Richard lied and we was old

enough to know better. That is when he started to tell me that I had beat up some old man after Richard said it.

Q. Where did they keep you while you were at Juvenile Hall?

A. Security.

Q. What is "security?"

A. It is P R 1. It is a room where you stay alone.

Q. How long were you in this room alone?

A. Five days.

Q. During this time were you permitted to talk to anyone except police officers?

[fol. 246] A. They only let me talk to police officers. It was the only time I could come out of security.

Q. Did you ever hear anyone tell you you could have a lawyer?

A. No.

Q. Did anyone ever tell you you could talk to your parents?

A. No.

Q. Were you permitted to talk to a lawyer or your parents while you were in security?

A. They didn't say nothing about the lawyer or talking to no one.

Q. And you didn't talk to either one, a lawyer or your mother?

A. No.

Q. How many time- were you questioned while you were there?

A. Three times.

Q. And the first time you told the police officer you knew nothing about this. Is that correct?

A. Yes, sir.

Q. And when you were first approached at 19th and Curtis, or in that area down there, by Detective Chism, he told you to get into the car, you thought he was going to take your shoeshine kit away——

Mr. Kane: I object, this is leading.

The Court: Sustained.

Q. Was he going to take your shoeshine kit away, is that what you thought?

A. Yes, sir.

Q. Did Detective Chism tell you he was going to take [fol. 247] you to Juvenile Hall?

A. Yes, sir.

Q. Was any questioning done there at 19th and Curtis?

A. No, he just asked us for our names.

Q. That is all he asked you for?

A. Yes, sir.

Q. Did you say anything at that time?

A. No, just told him my name, that is all.

Q. Will you state whether or not you were afraid at the time you were picked up your shine box would be taken away?

A. Yes, we was afraid, because once before they took our shine box away and we thought they was going to take our shine box away. That was all I was thinking of.

Q. And when they put you in this solitary confinement were you still more afraid then?

Mr. Kane: I object, that is a suggested answer.

Q. What did you say at that time when they questioned you about this matter?

A. I just told them I didn't know nothing about it, about beating this old man.

Q. Did you know whether or not they had Richard in solitary also?

A. I knew they had Richard in solitary.

Q. How did you know that?

A. Every time we would go to eat he used to tell me.

Q. Did you eat in the dining room or in your room?

A. In the dining room and lunch room.

Q. Do you know anything about this incident that occurred between Eddie and Richard?

[fol. 248] A. No, sir.

Q. And were you questioned the night of the 7th, do you recall the date?

A. Yes.

Q. Or was it the night before the 7th?

A. Recall the date of what?

Q. Of the questioning by Detective Miller?

A. No, sir.

Q. Do you remember Detective Miller?

A. Yes.

Q. The two detectives back here (indicating)? Do you know Detective Miller and Detective Chism?

A. Yes.

Q. Do you recall being questioned by Detective Miller?

A. No, sir.

Q. You don't recall that?

A. Yes, I recall when he took us to the (pause).

Q. Police Building?

A. Yes.

Q. Now, down at the Police Building what happened down there?

A. He just told us to tell them what happened about this matter.

Q. Did you see a lot of policemen as you went into the Police Building?

A. No, sir.

Q. Were there any policemen there?

A. Yes.

Q. How many policemen did you see?

[fol. 249] The Court: I think we can assume there would be policemen around the Police Building.

Q. Did they bring you directly from solitary to the Police Building?

A. Yes, sir.

Q. Now, had you previously come from Golden, from the Industrial School?

A. Yes, sir.

Q. And how long had you been at Golden?

A. Fifteen days.

Q. And you were sentenced there by the Juvenile Court?

A. Yes, sir.

Q. And you are still under a sentence, are you not?

A. Yes, sir.

Q. Did Detective Miller, or any other person ask you about whether you wanted an attorney?

A. No, sir.

Q. Did you get a chance to talk to any attorney?

A. No, sir.

Q. Did Detective Miller tell you you could talk to your parents?

A. No, sir, not while I was in security I didn't get to talk to my parents.

The Court: But did Sergeant Miller tell you you could talk to them, or a lawyer, at any time?

The Witness: No, sir.

Mr. Vigil: That is all.

[fol. 250] Cross-examination.

By Mr. Kane:

Q. Robert, I believe you said you recalled being picked up at 19th and Curtis?

A. Yes.

Q. Who was with you?

A. My brother Richard and my brother Charles.

Q. Did you know Detective Chism before this?

A. No, sir.

Q. Had you ever seen him before?

A. I had seen him before.

Q. Did you know who he was?

A. I knew he was a detective.

Q. Did you walk over to the car voluntarily—I mean he didn't drag you over?

A. No, sir.

Q. You got in the car?

A. Yes.

Q. Do you recall what he asked you?

A. Yes, sir.

Q. What did he ask you?

A. Just asked me for our names.

Q. Did he ask you where you lived?

A. He said he was going to take us to Juvenile Hall.

Q. Did he ask you about beating anyone at that time?

A. No.

Q. What time did you get to Juvenile Hall?

A. About ten.

Q. Had you ever been to Juvenile Hall before this?

A. Yes.

[fol. 251] Q. You knew about the procedure, and so on, this solitary?

A. Yes.

Q. Did he ask you about any beatings at Juvenile Hall?

A. Yes, as soon as he told me to come in the office, that is when he started saying we had beat up some old man.

Q. What did you tell him?

A. I told him I don't know nothing about this.

Q. Did you at any time say you knew anything about it?

A. No.

Q. Do you recall an old man, later in the week, coming down and identifying you, Mr. Krubd?

A. I remember seeing him, but I had never seen him before.

Q. Do you remember Detective Chism asking you anything about that?

A. Yes, he said there was going to be somebody come over here and see some witnesses they said they saw.

Q. Did you at any time tell Detective Chism or Detective Miller that you beat up anybody?

A. Yes, after my brother had said we had beat some old man up.

Q. What did you tell the officer?

A. I just told him I still had nothing to do with it, you know, when they were picking me up, well; that is when I told him I did it.

Q. What did you tell them you did?

A. I told them that I had beat up some old man after my brother had said it.

Q. Did you tell them that you distributed $13.00 and you [fol. 252] got some of it?

A. I didn't know anything about $13.00. After they said that that is when I——

Q. Did you say how much you got?

A. No, they was the ones that told me.

Q. Do you recall being in the Police Building about January 7th?

A. Yes, sir.

Q. That was several days after you were first arrested, was it not?

A. Yes, sir.

Q. I believe you stated you were in solitary about five days?

A. Yes.

Q. You were not in solitary when you were taken to the Police Building, were you?

A. They took me from solitary to the Police Building and when I came back they put me in security and the next day I got out.

Q. Was Eddie Martinez present any time you were being questioned?

A. Yes, sir.

Q. Did he make any statements at that time?

A. Yes, sir.

Q. Do you remember what he said?

A. No.

Q. Did he tell them about this particular beating?

A. Yes.

Q. Did he tell the officer in detail about it?

[fol. 253] A. Yes, sir.

Q. Did you agree with him——

Mr. Vigil: If the Court please, I think the record would speak for itself.

Mr. Kane: This is cross examination. I have a right to ask any question——

Mr. Vigil: I don't think so. This is a matter of voluntariness.

The Court: He asked if he agreed with his statement. That is what we have to know.

Objection overruled.

Mr. Vigil: Note our exception.

Q. Did you at that time agree with Eddie's statement?

A. Yes, after a few questions.

Q. Did Eddie give a statement in full at that time?

A. Yes, sir.

Q. Was this nine year-old boy present?

A. Yes.

Q. Did he make statements regarding this beating?

A. Yes.

Mr. Vigil: I think it should be explained to him about this agreeing. This boy is certainly being misled as to whether or not that was the fact of it.

The Court: If there is any doubt, rephrase it.

Mr. Vigil: I certainly am in doubt as to whether he

agreed with it. He has already stated he didn't know anything about it.

Q. Did Eddie make certain statements when you were present?

A. Yes.

[fol. 254] Q. Then you were asked if those statements were true?

A. They didn't ask me that.

Q. Do you recall what he asked you?

A. He just said that was all.

Q. After Eddie made the statements were those statements true that Eddie made?

A. No, sir.

Q. What was untrue about them?

Mr. Vigil: Again, if the Court please, we are attempting to develop the voluntariness, we are not going into the questions themselves. He has the statement that has been signed supposedly by these boys after being read, and the whole fact of the matter is that can be established from the statement. He is asking this boy to remember what was untrue.

The Court: He said it was not true. I think that is the answer.

Objection sustained.

Mr. Kane: Note our exception.

Q. You heard Detective Chism state that he interrogated you and two other boys in the car at the time of the arrest—that he questioned you?

A. He just told us—asked us what our name was and said we was going to Juvenile Hall.

Q. Can you read and write, Robert?

A. Yes, sir.

Q. Robert, I hand to you the original of the statement that was made by you and two other boys on January 7, 1959. Will you examine that and see if you read it and initialed it and signed it at that time.

[fol. 255] A. Yes, I remember reading it.

Q. And did you sign it, Robert?

A. Yes, sir, I signed it because he said whether we told the truth or didn't tell the truth he was going to send us to the Industrial School.

Q. Who told you that?
A. Detective Chism.
Q. When did he tell you that?
A. When we signed this confession.
Q. What did Detective Miller tell you when he talked to you?
A. (Pause)
Q. You answered those questions of your free will, didn't you, for Detective Miller?

Mr. Vigil: I think the question of whether it is voluntary is the very thing we are trying to establish.

Q. What did Detective Miller say to you when he asked you those question outside of the questions——

The Court: Did he threaten you?
The Witness: No, sir.

Q. Did he just ask the questions and you gave the answers?
A. Yes, sir.
Q. He didn't threaten you in any way?
A. No, sir.
Q. Did he beat you in any way?
A. No, sir.
Q. And he just asked the questions and you gave the answers?
A. Yes, sir.

[fol. 256] Mr. Kane: I have no further questions.

Redirect examination.

By Mr. Vigil:

Q. What was the reason that you gave these answers to Detective Miller?
A. (No response.)
Q. These answers right here (indicating) Exhibit D, that you gave Detective Miller, what was the reason you gave those answers?
A. I was scared that if we didn't do it they would keep us in security longer.
Q. How long had you been in security then?

A. Five days.

Q. You had been in security five days. While you are in security you are kept in solitary confinement, is that right?

A. Yes.

Q. And you were afraid of that?

A. Yes, sir.

Mr. Vigil: That is all.

Recross-examination.

By Mr. Kane:

Q. Robert, you said you were afraid of being put in security. Is that right?

A. Yes.

Q. Did Detective Chism say he would keep you in security?

A. No, sir.

Q. Did Detective Miller say he would keep you in security?

[fol. 257] A. No, sir.

Redirect examination.

By Mr. Vigil:

Q. You were already in security, were you not?

A. Yes, sir.

Q. Did anyone say anything about releasing you from security?

A. No, sir.

Q. You were released from security as soon as you signed these statements, were you not?

A. Yes, sir.

Mr. Vigil: That is all.

Direct examination.

Of the Witness Eddie Raymond Martinez.

By Mr. Cisneros:

(Discussion off the record.)

Mr. Vigil: If the Court please, I don't think this boy can be qualified because of his low I.Q. and his inability to read and write.

The Court: Does anyone want to ask him? Perhaps he is afraid of a Judge asking the questions.

Mr. Rossman: I think it is a matter of his own counsel qualifying him.

(Questions by Mr. Cisneros)

Q. Eddie, you will have to speak up. Eddie, if we ask you some some questions over here (indicating), will you tell the truth?

A. Yes.

[fol. 258] Do you know what it is to tell the truth?

A. No.

Q. But if I ask you any questions, or the district attorney asks you any questions, will you tell the truth to the Court, the Judge?

A. Yes.

Q. Do you know what will happen if you don't tell the truth?

A. No.

Q. Do you know you should tell the truth, Eddie?

A. Yes.

Q. And do you think telling a lie is right?

A. No.

Mr. Vigil: I would like to question him.

Questions by Mr. Vigil.

Q. Do you go to church—have you been to church in Juvenile Hall?

A. I do.

Q. Did you go to church when you were at home?

A. Yes, sometimes.

Q. What church did you go to?
A. Guadalupe.

Mr. Vigil: Our Lady of Guadalupe.

Q. And did you go with your mother or father?
A. I just go with some boy.
Q. Did you go by yourself?
A. No.
Q. With this other boy?
A. Yes.

[fol. 259] Q. Now, when you went to church you know the priest explained about God?

A. I can't understand him.

Q. Do you know that if you don't tell the truth that you might be punished?

A. No.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: He says he doesn't know what it is to tell the truth; he says he doesn't know of any punishment connected with it if he doesn't. I don't think he is qualified, I don't think he can testify.

I will make the same ruling for the record, that the defendant, Eddie Martinez, is not, in the opinion of the Court, qualified to testify, for the reasons given in his answers to questions regarding his ability to tell the truth.

The Court will have to make the finding this defendant does not know the truth and is not able to distinguish it, from the answers he has given in the record. If he does not know the difference between lying and telling the truth, the oath would mean nothing. So, therefore, in view of Eddie's answers he doesn't know the meaning of the oath and, therefore, I cannot let him testify in this case.

(Discussion off the record.)

(A short recess was taken.)

Mr. Vigil: As I understand it, if the Court please, I think this entire hearing should be held in the court room—should have been held in the court room, for reason that the defendants are entitled to a public hearing.

The Court: The public can come in here. I ordered this to be in Chambers and the public are welcome.

[fol. 260] Mr. Vigil: We object to any of the psychiatrists testifying because the psychiatrists were appointed at the instance of the defendant for the purpose of an examination being made in their behalf, and for the reason that the defendants could not afford to hire any Doctors. The psychiatrists have a confidential relationship to the defendants and which confidential relationship we are claiming, and have claimed heretofore that it is the function of the Court to determine whether a witness is qualified to testify from listening to the witnesses and not from outside interests as to the condition of the witness; that the issue in the case as to whether or not the state must prove that the two defendants are able to distinguish between good and evil is an issue that should have been included in the Information if it were a matter that had to be proved, and this matter was argued heretofore, and the Court at that point ruled against the objections made by the defense.

It is our contention at this point that the witnesses that were sought to be brought, namely, the psychiatrists, as witnesses before the Court cannot be used by the prosecution in an attempt to establish what they now consider is a phase in this case. That must be established by them on their case in chief.

We, therefore, object to any psychiatrist testifying in view of the fact that they were not appointed to examine as to the sanity or insanity of the boys, but only appointed at the instance of the boys, as the record will show so far as the petition of the boys was concerned, and we object to any further proceeding insofar as the psychiatrists are [fol. 261] concerned at this time.

Mr. Rossman: I think it is proper to have a ruling on this poin right now, on the objection to the psychiatrists testifying——

Mr. Vigil: At this point or for the whole trial.

The Court: You object to their testifying at any time in the trial.

Mr. Vigil: That is correct.

The Court: The objection is overruled based on the authority of Martinez vs. People, 124 Colorado 170, and

specifically at the bottom of page 181 and page 182, wherein the Supreme Court said: "The Judge, of course, may appoint doctors to make such an examination and the Court may call and examine said physicians as witnesses at the trial and either the state or defense, or both, may call said doctors as witnesses."

(Argument of counsel.)

The Court: I will make it clear for the record. Calling psychiatrists has nothing to do with whether or not the boys are sane or insane. The statutes provide that where the defendants are children they must know the distinction between good and evil and the question of sanity or insanity has nothing to do with it. Under the statute the Court has to know, and it has to be shown, whether they know the distinction between good and evil. Assuming they are both sane, the Court must know whether they know the distinction between good and evil.

This morning it came up whether or not the purported confession signed by the boys was voluntary, and the Court, [fol. 262] after listening to testimony by the detectives then listened to the testimony by the one boy, Robert Gallegos who was sworn in as a witness, and on examination by the Court it was determined he knew the nature of an oath and understood he had to tell the truth and not lie. However, when the Court and counsel attempted to qualify Edward Martinez, it developed from Edward's testimony he did not understand the nature of an oath and he said that he didn't know if he should lie or tell the truth.

The Doctor's report made to the Court was that both boys knew the distinction between good and evil, and that is why I called the doctors in.

The Court is doing this, of course, because the Court fully realizes that in this trial we are dealing with children and we have to have some help. I will not allow Edward Martinez to testify if he doesn't know the meaning of an oath, and I am doing this for the protection of the children.

(Colloquy of Court and counsel.)

Mr. Vigil: Note our exception to the Court's ruling.

CHARLES A. RYMER, called as a witness in behalf of the defendants, having been duly sworn, on oath testified as follows:

Examination.

By the Court:

Q. You understand, Doctor, why you are here, and I am not going into the question of sanity or insanity, but Eddie Martinez has testified he does not understand the nature of an oath. So, I have to know whether or not you [fol. 263] made any examination that will reveal that he does know whether he should tell the truth or not. If you didn't go into that just say so. If he doesn't know the nature of an oath, or doesn't understand there is any punishment for lying, I cannot let him testify.

Did you make such an examination?

A. I didn't interrogate him specifically about an oath, but in terms of the examination I did talk to him as to right and wrong and good and bad, and as a result of my examination I felt he certainly had an awareness and that he did know he had done something wrong and I felt he knew the difference between right and wrong. Specifically, I have it coming out at the end of the examination and he said, "Yes, when you do something right is when you do something good, and wrong is when you do something bad." And the history of this boy is that four years ago he was in Juvenile Hall and I asked him, for what, and he said he snatched a woman's purse and he knew that was wrong.

Q. What is his I.Q.?

A. That is in another department, I personally did not do an I.Q., but he told me something of his schooling, that he had some trouble in school; indicated he was in the fifth grade; he said there were eight members in his family, six boys and two girls and gave me their address, told me about his father and mother; father was not working; in school, Remington school. He said he had trouble in reading, social studies, but in arithmetic he did all right. At this level I felt putting him to subtracting 4 from 43, and consecutively going to the end, would be a sign he was [fol. 264] not too slow. He comes to "14" and he immediately picked up the mistake, going to "7," that be-

ing the last number, and he said, "I want to do that again," and he goes to the end of the problem, and when he had finished he talked of this whole situation and I felt he knew that something was happening and that it was wrong.

Direct examination.

By Mr. Vigil:

Q. Do you know whether this boy can read and write?

A. That apparently he cannot do.

Q. You learned that from the newspapers, apparently?

A. No; no, I didn't read anything in the newspaper about that, and it was on that basis that he could count, I felt that test showed some ability.

Q. Another Doctor did the test on the I.Q.?

A. Yes, he is in the Juvenile Court.

Q. He had already done that?

A. No, I don't think so.

Q. In fact, he did them before they had the hearing in the Juvenile Court?

A. It shows tests 3/13/59.

Q. You are not aware of the fact these boys were tried in the Juvenile Court and sentenced to the Industrial School, are you?

A. Yes, I learned that from Mr. Poremba and that these tests were done.

Q. Actually they were not done for that hearing?

A. Yes, they were done. This was in January or late [fol. 265] December.

Q. Let's put it on this basis. So far as your examination, how long did you spend with this boy?

A. I saw him several times.

Q. This particular boy here (indicating)?

A. When I saw one I saw the other and I saw them four times over a period of two and a half or three weeks.

Q. A half hour each time?

A. From an hour to an hour and a half.

Q. So far as your determination, you think because a boy is in the 6th grade, you think he is perfectly normal. Is that what you are saying?

A. I am not saying he is normal, I think he knows the difference between right and wrong.

Q. That is not what we are determining——

A. I think he understands what he is doing and what he has done and what his present situation is, and I will explore a little more——

Q. No, I don't care to explore. Did you know you were called at the instance of these boys, that is, you were to make the examination at their instance?

The Court: That would not have anything to do with it. The record shows he was appointed by the Court.

The Witness: And Mr. Cisneros did call our office after he knew I was appointed. I don't know if he called anyone else, but he indicated he would like to have me call him and he would help in any way he could that I might arrive at an opinion about these boys.

Mr. Vigil: No further questions.

[fol. 266] Cross-examination.

By Mr. Rossman:

Q. Do you have any opinion at this time as to whether or not the boy, Eddie Martinez, would be able to understand the nature of an oath?

A. Yes, I believe he understands if he is taking an oath to swear to tell the truth, I think he knows.

Q. Do you have any opinion as to whether or not he knows the meaning of the word, "truth"?

A. Yes, I think so.

Q. Do you have any opinion as to whether he knows what the meaning of the words, "to tell a lie," is?

A. Yes, I think he knows the difference.

Q. Do you have an opinion as to whether or not he is able to distinguish between telling the truth and telling a lie?

A. Yes.

Q. If you had been here to hear him testify he doesn't know what to tell the truth is, would that be consistent with your finding?

A. No, I think he is a very intelligent boy and knows what was happening here, that he is simply fencing. He did the same thing with me.

Q. Will you explain that, Doctor?

A. Yes. First I asked him how all this happened, and

he indicated that Robert's brother, whose name is Richard, I believe, had apparently said that he was involved in this, and then he told a long story that that is all wrong, that they had gone to someone's grandfather that particular [fol. 267] night, but he did state, and each time—one reason I wanted it, so many times he kept telling me they had given some statement to the police, and I said, "Will you please tell me what you told the police?" And he said no because Mr. Cisneros had told us not to talk to anybody. The way he handled the whole situation I think he knows what he did. He never did tell me what he did, nor did he elaborate. I think he knows the difference between right and wrong. He said, "They say we did this and our lawyers stated to let them prove it." I think he has a very clear awareness of what happened.

Mr. Rossman: I have no further questions.

Mr. Vigil: That is all the questions I have.

R. Robert Cohen, called as a witness in behalf of the defendants, having been duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. For the record, your name?

A. R. Robert Cohen, physician, specializing in psychiatry.

Q. In accordance with an order of this Court, you were appointed to examine the defendants?

Mr. Vigil: I think that is immaterial. I think what is important, he was appointed in behalf of these boys and bears a confidential relationship to them, and we object to his testifying at all.

The Court: The same ruling.

Mr. Vigil: Note our exception.

[fol. 268] Q. In accordance with the order of the Court, you were appointed——

The Court: Let the record show the objection was overruled.

Q. (continued) to examine the defendants Robert Gallegos and Eddie Martinez?

A. Yes, sir.

Q. And did you make such examination?

A. Yes, sir.

Q. With reference to the examination now specifically of Edward Raymond Martinez, were you able to form an opinion as to whether or not the defendant Edward Raymond Martinez is capable of telling the truth?

A. Capable of telling the truth?

Q. Yes, whether he knows what the truth is?

A. Yes, I think so.

Q. As distinguished from lies?

A. Yes.

Q. Upon what do you base that opinion?

A. Upon two hours of examining and talking with the boy.

Q. Do you have an opinion as to whether he knows the nature of an oath?

A. I would think so.

Q. Upon what do you base that opinion?

A. The same thing.

Q. Will you tell the Court specifically the fact or factors that enter into your finding on these two matters only, at this time.

A. It was my feeling after talking to Edward that he [fol. 269] definitely was able to distinguish fact from fiction, and definitely was able to distinguish right from wrong, and apparently, from everything I could ascertain, also was able to hold to the right, which is that he adjusted, that he was fully capable of forming a mental and intellectual stand.

Q. If you were here and had heard Edward state that he did not know what the meaning of the word, "truth," was, would that be inconsistent with your finding?

A. I think so.

Q. That he did not know what the truth was?

A. I am sure he knows what truth is, even if he cannot perhaps define the word.

Q. In other words, it is merely a matter of definition?

A. That is right.

Q. But so far as knowing what to tell the truth is, you would think he is able to distinguish the truth from a lie?

A. I think so.

Q. Do you think he knows what it means not to tell a lie?

A. Yes, sir.

Q. Is that based on your findings and examination in this case?

A. Yes.

Q. Do you know whether or not he has any conception about a Diety of any kind?

A. Yes, he has.

Q. And as to any punishment that might be derived from [fol. 270] such Diety in the event of any wrongdoing, or attempt to withhold and not stand by the truth?

A. Definitely.

Q. Will you explain that to the Court, please?

A. I believe Edward most definitely has an acquaintance with the conception of morality. It was rather interesting to me that a boy his age would have equated good or bad, right or wrong, in the terms of the trouble one can get into if one does not do the good, or right. He was constantly talking about difficulties, trouble, all the time, so that there is no question in my mind that he is certainly able to discern between right and wrong and to adhere to the right even if it means in terms only to avoid trouble, or doing the wrong.

Mr. Rossman: That is all.

Mr. Vigil: No questions.

Mr. Rossman: We do not have Doctor Tepley, but I think the Court has been sufficiently enlightened that we could attempt to further qualify this boy.

The Court: The boy says he cannot distinguish the truth from a lie—I mean it is a dilemma.

What do you think, Mr. Cisneros?

Mr. Cisneros: I think we have stated our position, your Honor. I don't think he can. I have talked to him dozens of time-.

(Argument of counsel.)

(Thereupon a Recess Was Taken to 2 o'clock p.m.)

[fol. 271] Afternoon Session 2:00 p.m.

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

STATEMENTS OF COUNSEL RE MOTION ON THE VOLUNTARINESS AND RULING THEREON

The Court: Let the record show that the former ruling of the Court that the defendant, Edward Martinez, would not be a competent witness for the reasons stated previously by the Court, is renewed, and as far as the question of the voluntariness of the statement given by Edward Martinez, I think the only safe course is to rule it out, because it is questionable whether he knows the truth from the untruth, and the Court realizes that he cannot read and write. On those questions alone I think it would be questionable to let it in.

Mr. Rossman: Let the record show our exception to the ruling of the Court as to the admissibility of the statement as to Edward Martinez.

Mr. Vigil: As I understand it, the prosecution has called, or asked that the Court call the psychiatrists, and it was our view that all of the psychiatrists should be called by the prosecution, and we object to their calling any of them and ask all that testimony be stricken from the record.

The Court: I will rule the state may call the three psychiatrists on this question, do they know the difference between good and evil.

Mr. Vigil: Save an exception to the Court's ruling.

We have before the Court a motion to suppress the evidence, and, of course, we made a motion on the voluntari-
[fol. 272] ness, so I will argue the voluntariness first. That is something that must be decided if there is a doubt in the Court's mind, in favor of the defendants.

As I view the situation, the state must prove these facts and satisfy the Court beyond a reasonable doubt.

In this case what we have, so far as Robert is concerned, with regard to this statement, is the policemen's statement, two detectives, who testified with reference to how this statement happened to be taken. Essentially, the statement indicates the defendants were picked up and apparently taken to Juvenile Hall and there put in solitary confinement. It has been stated by Robert that he was kept

there five days and questioned three or four times during that time.

There are four statements before the Court. In those statements it appears there are variations as to what happened. Ultimately there was a formal statement taken, so-called, by the defendants. So far as statements are concerned Robert's view of this was, as he stated, he was kept in solitary. I dare say any grown person, much less a boy of his age, even over night, or two nights, or three nights, would more than likely say anything if he felt that was what they wanted to know, and the fact is they did release him after the statement was signed.

I would like to point out, first of all, one of the elements, this deceased was drunk. In fact, from the records, as the doctors testified, indicated he was drunk. The other thing is they went into this hotel, that the man was going to get them a drink of water and actually did. As a mat- [fol. 273] ter of fact, there is no room has any water, and they could not have gotten any water, and that shows the statement is not true. And that opposite to that voluntariness is concerned a question that is involved, is this person saying this because he is willing to make a statement without any pressure being exerted on him. Can we say a boy Bobby's age being held five days, or even one day, is making a voluntary statement in this particular situation. We are going into this because I can see it is very important, the voluntariness of it.

We have had this question up before in the Reed case, 122 Colo. 310——.

(Argument of Counsel and citation of authority.)

Mr. Rossman: Your Honor, I do not feel there is any merit to Mr. Vigil's argument. In other words, he is trying to tell you you would have to take into consideration the various individuals involved. That has never been the law. The statement is either voluntary or involuntary, and if it is voluntary as to Robert Gallegos, it is to the others—the mere fact a man is incarcerated would not lend inadmissibility to any statement if, after incarceration such a statement may be made. I do not think there is any merit to Mr. Vigil's argument.

The Court: The testimony presented to the Court, out of the presence of the jury, regarding the voluntariness of

the statement, shows that the defendants were approached by Detective Chism on the street and they were not forced to get into the car, they got into the car and were taken to Juvenile Hall and when boys of this age are brought in they [fol. 274] are put alone in a room. About five days later, on January 7, 1959 they were taken to the Juvenile Bureau at the Police Building and Sergeant Miller testified they were told they could have their parents and also told them they did not have to make any statement. Sergeant Miller examined Exhibit D and said it was correct, although he was not present.

Defendant Robert Gallegos, after being sworn and after examination by the Court and the Court being satisfied he knew the nature of an oath, said the statement was taken. That he was put in this room alone in the Juvenile Hall. However, he continually referred to the fact he was in solitary confinement, but I do not think that was exactly it because he ate in the dining room. He said he was questioned three times and that he was not threatened or mistreated by anyone. He stated the only thing he was afraid of originally was they would take the shoe-shine box. He also stated he knew Detective Chism was a detective because he had been in Juvenile Hall before.

The Court cannot find that the defendant was in any way dealt with unfairly, or threatened, or intimidated. He may have had certain fears in his own mind once somebody put them there. I cannot rule it was involuntary.

The Court will, therefore, rule the statement is voluntary as to Robert Gallegos.

Mr. Vigil: Note our exception.

[fol. 275] STATEMENT OF COUNSEL RE MOTION TO SUPPRESS EVIDENCE AND RULING THEREON

Mr. Vigil: Now, if the Court please, with reference to our motion to suppress the evidence I should like to point out the first point we have under that motion is the ages of the boys, and the law is clear, and I think all of us will agree that under the law in Colorado, and everywhere, they are not bound by any of the statements.

The Court: You are arguing that even if it were voluntary they still are not bound by the statements?

Mr. Vigil: That is exactly right. 3 Colo. Reports 291.

This is a civil case, but I think if it is the law in civil cases, it would have to be the law in criminal cases. The case says:

> "An infant is incapable of an admission which will affect her own rights, much less can her admissions be used against a third party who assumes to stand as her trustee. The admission of such evidence in a trial to the court, where the exception reserved to the finding is sufficient, may be reviewed on error."

I think it is generally held, and rightly so, in all these civil cases that an infant cannot be bound by any admission and statements, and generally we know infants' contracts are of no value if they elect not to stand by them and I think that is the rule generally.

If it is the rule in civil cases, there is no reason why it would not be more effective in criminal cases, because you have to give the infant the benefit of reasonable doubt.

Now, that same reason is raised in what we have desig- [fol. 276] nated in point 2 because of the fact they were of such age the statements could not be voluntary and, generally speaking, throughout the United States persons under the age of fourteen are not bound by these statements, which was Bobby's situation, and also Eddie's situation.

The other point is, the statements were given in the absence of anyone appearing for them, either the parents or attorneys, and, of course, this is a particularly serious offense, and the police themselves recognized it because they were able to get a formal statement. At the time they did this, the point is the deceased was still alive, but they knew he was in serious condition, so they were bound to make certain someone appeared in behalf of these boys who represented them. But they did nothing about that. And it is important that under the laws of the United States, the Constitution of Colorado, and the Constitution of the United States these boys were entitled to be represented, but they didn't get it. They were not, there is no dispute about that, represented by anyone in spite of the fact they had been held for five days at that time, and they were entitled to this protection.

The next point I think is basically the same, point No.

4. The point there covers all these various matters that we have already discussed, that they were entitled to representation by counsel, that they were held in confinement, that they were frightened and had no one to advise them and they necessarily, therefore, would be under some compulsion to make some statements and that they would be released.

[fol. 277] Now, we have here what the detective states is a combined statement. I asked him whether he could separate one statement from the other, and he said he could not. The effect of that is, so far as he is concerned, he took a statement from three people. There is no question under the statutes of Colorado that Section 153-1-6 provides as follows:

> "The following persons shall not be witnesses:
> "Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly."

Now, obviously, here is the situation there. We have a statement of a nine year-old boy that has made a joint part of the statement which is sought to be introduced here. What is the effect? We have a joint statement here by a boy who is not able to testify under the laws of Colorado, Richard, who appears right in the center of this thing, who is obviously not a party to it, is not a defendant, who is not in the case at all. They are seeking to introduce a statement which they could not do directly. They would have to prove his ability to do what the statute says before they could even produce him as a witness. But they are seeking to have this testimony produced before this jury, and that is why we say this statement is inadmissible and should be suppressed by the Court.

Now taking point 5, which I think disposes of this matter.

Section 22-8-1 of the Colorado Revised Statutes provides [fol. 278] what we consider is the element that disposes of these statements, regardless as to what the finding of the Court is, or anything else, with reference to these particular statements. In this case there has been a determination by the Juvenile Court: there has been a hearing, and I would like to introduce all of the testimony so it can

be considered by reference to the previous hearings, but in this the Juvenile Court has made disposition of both of these boys and has sentenced both of them to the Industrial School where they presently are under a sentence. In conducting it that way they necessarily had to hear the evidence which is sought to be introduced here, not only as to the general purport of it but also as to the details, and I am sure they are with the last hearing. There was no dispute at the time they were guilty by their statements and convicted these children of juvenile delinquency, which they did. They introduced the evidence and it was presented there.

Now, this section 22—8-1 provides, among other things, that the Juvenile Court shall retain jurisdiction of a case which it originates, and another provision is:

> "A disposition of any child under this article or any evidence given in any such case, shall not in any criminal or other cause or proceeding whatever be lawful or proper evidence against such child for any purpose excepting in subsequent cases against the same child under this article."

Now, the statute obviously means something and it has been construed. In that case we had an entirely different [fol. 279] situation, there was no formal charge against the child twelve years old filed in the Juvenile Court. Judge Lindsey, in that case, determined that so far as he was concerned that he was bound by the statement made to him as being confidential. The trial court ruled he was in contempt and the district court added a fine of $500.00. The Supreme Court had this to say—this is the case of Lindsey v. The People, 66 Colo. 343 at pages 352-3:

> "We search this section in vain for any authorization of instantaneous jurisdiction or proceedings pending in the breast of the judge. It clearly appears from an examination of these statutes that at the time the communication in question was made to plaintiff in error, there was no case pending against Neal Wright, and the Juvenile Court had no jurisdiction over him. For the reasons given, the further provisions of section 586 prohibiting the giving of evidence in such juvenile delinquency cases against the delinquent

or any witness in the case in any other court or proceeding, have no application. This portion of the section contemplates a case pending, and a hearing thereon, and prohibits the giving of the evidence taken in such hearing 'against such child.' There was no case pending against Neal Wright; there was no hearing upon any such case; the evidence sought from plaintiff in error had not been given in any such case, and it was not sought to be introduced against Neal Wright in any sense of the word as used in this act."

[fol. 280] Now is it clear, however, that in this case there was not only a hearing, but these two boys, Robert Gallegos with whom we are concerned now, was sentenced to the State Industrial School based on this same evidence sought to be introduced here. The statute is clear that the proceeding is one in which it cannot be used. These boys have been sentenced to spend whatever time is designated—several years—in the Industrial School.

As far as we are concerned at this point this evidence must be suppressed based on this statute in the case involved and I feel the Court must suppress the evidence as against both of these boys and particularly with reference to Robert Gallegos.

Mr. Rossman: I cannot conceive of any thinking on the part of the legislature in the statute which counsel raised as conferring exclusive jurisdiction on the Juvenile Court, but it would appear this statute does. In other words, if any evidence is presented in Juvenile Court which is used against him in the Juvenile Court and this would in fact confer on the Juvenile Court a status with respect to all matters, regardless of how severe they may be. And if the Court feels it does confer such jurisdiction that it cannot be offered in any other court, counsel's statement would necessarily be correct, it seems to me.

(Discussion off the record.)

The Court: This statute 22-8-1 cited by defendants contemplates a case where—and the only reason I can see why the legislature would do it is this, once a child is filed on under a delinquency proceeding—and that is what [fol. 281] the statute defines. The legislature was protecting the child from this delinquency so that they could

not turn around and file on the same act in the district court, or some other court, as a criminal act and use what was termed in the Juvenile Court a criminal case. So, if they didn't have that in the statute you might have a situation where they would make a filing of delinquency and use certain facts and use it as a discovery proceeding and then file on him in the criminal court. So that is the only way you can protect the children, they could use it as an investigation and file on them here.

What we are talking about here is an entirely different proceeding. They were tried on something else because here it is murder. So you are not using any evidence that was used in the Juvenile Court to convict him of delinquency. This is a new offense that happens after that trial. As I see it, it is two separate cases entirely. They were tried in Juvenile Court for the robbery aspect of the case, because the victim was still alive. When Mr. Smith died an entirely new action arose, and for that reason I feel the article is not applicable.

Mr. Vigil: I think it is applicable. I think the evidence sought to be introduced here is the evidence used in the Juvenile Court and they are seeking to establish this case in the district court. I say this statute prohibits the use of the same evidence, and I am sure the District Attorney must agree to that, that that is the effect of the statute. Otherwise, the statute is meaningless and if we are going to say this is a new offense, obviously that is [fol. 282] what the statute says, it cannot be used in another court. If it is new evidence that was not to establish the crime, this is the effect of those statements, the prosecution must first establish the corpus delicti with regard to the robbery, and the only way they can do that is to use that evidence, and they are trying to establish the very thing that was established in the Juvenile Court, the robbery, and I say that is exactly the statement they are seeking to introduce, and I say it is wholly improper under that statute.

Now, the rest of this, that is as to the murder, which is the other element in this court, murder is something apart from it. The Court's reasoning on that may be applicable to a murder charge. But they are seeking to use the same statements made in the Juvenile Court.

Mr. Rossman: He is exactly correct in that the homicide and the robbery all tie in.

The Court: Are you not doing what the statute says you cannot do?

Mr. Rossman: We have no independent evidence of the homicide without the robbery.

Mr. Rossman: There is no way escaping, the conclusion is that of establishing this homicide by proving the robbery.

The Court: It would appear on the surface that that is what you cannot do.

(Discussion off the record.)

Mr. Rossman: Defendants' position is that the construction of this statute relates to something other than original [fol. 283] evidence. We contend our testimony sought to be introduced would be in the nature of original evidence and would not be subject to this section 22-8-1, that that section was contemplating a transcript of the evidence in lieu of any other evidence, and that is the evidence prohibited by the statute. That is our interpretation of the construction of this statute and that anything of an original nature and they may have testified to that in the original hearing is not that which is sought to be kept out by virtue of section 22-8-1.

The Court: Is there any further argument on it? I am ready to rule if there is not.

Mr. Vigil: I would like to say at this point that Dr. Tepley has come in, although I have no desire to call him.

The Court: That would not apply on the construction of the statute. I will rule on the construction of the statute first.

The Supreme Court of Colorado, in the case of People, ex rel. Cruz v. Morley, District Judge, 77 Colo. 25, discusses this article on delinquency and the Court laid down the proposition that in the case of a person under eighteen years of age there is concurrent jurisdiction between the Juvenile Court and District Court and whichever court acquires it first would have jurisdiction. The reason, the Supreme Court points out, is that the jurisdiction of the district court is not limited and should not be limited, and no statute should be held to limit it unless it says so

plainly. This statute, I do not consider as limiting the district courts or their jurisdiction by the legislature. [fol. 284] In this case, we have the charge before the Court of murder and there may be many elements in the order of proof that would be necessary to prove the charge for murder. The case was filed in this court, a motion was presented to transfer it to the Juvenile Court. At that time it was held that the district court first acquired jurisdiction and, therefore, would have to be tried here.

Going back to Lindsey vs. People, certainly it is obvious there is no charge of murder pending in the Juvenile Court and there has been no testimony on that. As I pointed out before, at the time of the delinquency case the victim had not died. I cannot conceive that the legislature would intend to mean in a situation such as this there could be no trial and that the district court would be deprived of jurisdiction merely because there had been another hearing on delinquency in the Juvenile Court.

Following the case in 77 Colo. 25, I will construe the statute strictly as the Supreme Court says should be done, namely, that the district court would not be deprived of jurisdiction unless the Supreme Court says it should be. This is a different case entirely, namely, this is a case of murder and there is no case of murder pending in the Juvenile Court and, therefore, the statute cited is not applicable.

Mr. Vigil: I would like to point out that this is not a statute that deprives the district court jurisdiction. The only thing the statute says is that certain evidence is excluded. If the prosecution can, by their evidence, prove [fol. 285] their case, that has nothing to do with the exclusion of this evidence. What they are seeking to do here is to use the same evidence of robbery in order to arrive at what is called first degree murder as to Bobby and I say it is wholly improper under that statute.

I agree with the Court's reasoning as far as the jurisdiction is concerned, but this suppression of evidence, the evidence sought to be suppressed here, there is no question about it, there isn't any, so they are seeking to introduce evidence of robbery in order to make this first degree murder, which has been amply pointed out. I think it is improper under that statute to produce that evidence. I do not think, whether the district attorney has other evi-

dence or not, the proposition is if these boys were being tried for robbery, could they bring in this evidence? Of course not. The Court would say that under this statute you cannot bring in this evidence.

We are not seeking to say the Court does not have jurisdiction. All we are saying is this particular bit of evidence is not admissible, and I think the reasoning of the Court so far as jurisdiction, no one is raising that point. We filed a motion with reference to putting this case in the Juvenile Court and that was overruled. So far as I'm concerned that is the situation. More than that they have used two psychiatrists. One of the psychiatrists is here and I think he should be questioned under our exception to the Court's ruling.

[fol. 286] Mr. Rossman: I want to state something further, if I may.

The Court: Go ahead.

Mr. Rossman: I would like the Court to re-examine the position taken and ruling made in connection with the admissibility now of the statement of Edward Martinez, for the reason—and I think we want it clear in the record—I think I can cite something helpful to the Court, that the mere fact a person may not be competent to testify as a witness does not exclude evidence that such witness may give. Competency is a matter of ten years old, and it would seem if they are capable of receiving just impressions——

The Court: There are cases on that.

Mr. Rossman: By the same token the mere fact a person's testimony, from a testimonial point of view, may be incompetent does not make the evidence inadmissible.

Berger vs. People, 122 Colo. 367. In that case, which is a serious case, the court upheld a death penalty where there was no confession and where the only eye witness was a seven year old who was determined to be incompetent to testify, but the court permitted him to testify and the court upheld the death penalty.

(Argument of counsel.)

Mr. Rossman: Quoting from the Berger case at page 373:

"At the conclusion of all of the evidence, the court denied defendant's motion, which was: 'If the Court please, the defendant desires to move at this time, at the conclusion of the evidence of all parties in this [fol. 287] case, that the Court withdraw from the consideration of the Jury any question of death penalty herein, and that a verdict for such penalty be not submitted to the Jury. And as grounds for this motion, that no confession or admission by the defendant of the killing of the deceased Pauline Berger has been offered or admitted in evidence; and that the only evidence of an alleged eye witness to the said killing was the witness Robert Berger, the seven year old son of the defendant, who was incompetent to testify as a witness at all, and whose testimony was so confused and contained so many statements in contradiction of all of the physical facts of the case as to be improper for consideration of the Jury, and insufficient upon which the Jury might base a penalty of death, and cannot find a conviction of first degree murder.'"

Now, the Court, however, did submit the death penalty and the jury did assess the death penalty and the Supreme Court sustained the death penalty.

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"Robert's testimony was that of an eyewitness and was direct, as distinguished from circumstantial, evidence. Generally it may be said that direct evidence is such as establishes the existence of a material fact without indulging in any inferences or presumption. The determination as to whether evidence is direct or [fol. 288] circumstantial is exclusively a prerogative of the court, while the weight to be given such evidence is likewise an exclusive prerogative of the jury.

"It, therefore, must be admitted that Robert's testimony was direct evidence. Nevertheless it is here contended that he was, on account of nonage, incompetent as a witness, and further that his testimony was susceptible of a construction that made it circumstantial evidence. With this last contention we

cannot agree. We have examined the statutes on murder in every state in the United States, as well as the federal statute, for the purpose of ascertaining whether a statute similar to ours might be found, and, if so, the construction given it. As a result of our search we found that the murder statute in Georgia was the only one that provided for a different penalty when the evidence was circumstantial alone."

And they cited the Georgia statute and they have cited further Georgia cases.

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"As is indicated by the quoted motion of defendant's counsel, at the conclusion of all of the evidence, it is his contention that Robert's testimony should be wholly disregarded, and it is here now contended that it is susceptible of a construction as circumstantial, rather than direct, evidence. It should be noted that Robert's testimony was corroborated in every material [fol. 289] respect. Robert said his father choked his mother; the coroner found that her death was occasioned by asphyxia due to strangulation. * * *

"We gather from the record that the objection to Robert's competency as a witness is based upon his youthfulness rather than his intelligence. Our statute provides in effect that children under ten years of age, who appear incapable of receiving just impressions of facts respecting which they are to be examined or who are incapable of truthfully relating these facts, shall not be witnesses. * * * We have called attention to the fact that after an extensive examination out of the presence of the jury, with full opportunity given counsel to interrogate him, the court determined that Robert was competent and was capable of receiving just impressions of fact and truthfully relating the same. After the examination of Robert, in the absence of the jury, and with reference to his competency and qualification as a witness, the court said:

" 'The Court is of the opinion that this particular child is certainly capable of receiving impressions and communicating them in a fair and accurate manner. As to his credibility that correctly is, of course, a mat-

ter for the Jury to decide, and the Jury will, of course, be instructed on that particular matter as is the case with all witnesses.

"'So far as the capacity to take an oath and to have a proper understanding of that, the Court is [fol. 290] impressed with the opinion that this child probably possesses more than the average ability of a child of that age, and has perception of the difference between telling a lie and telling the truth. His answers to some of the questions were better answers than many of us adults might give."

The statute relates to a dual consideration, No. (1) is, is he capable of receiving impressions, or (2) with telling the truth. That is what this statute says. The Court has the right to determine one or the other or both.

Mr. Vigil: The Court has already determined that.

Mr. Rossman: The statute is as follows:

"Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly." 153-1-6 (2).

The Court must make a dual finding in order to disqualify him as a witness.

It is our contention that statements or declarations of incompetent witnesses may be competent, such as a res gestae statement of a wife against a husband is certainly admissible, a person, a child who is too young to understand the nature of an oath, a res gestae statement by such child would be admissible against the accused even though such person might be incompetent to testify.

We submit, your Honor, under this ruling, in spite of the fact the Court may have ruled Eddie is incompetent as a witness, that does not automatically and per se make [fol. 291] inadmissible any statement he may have given, and we submit this is a matter for the jury to determine from all the facts whether or not he was capable of answering questions that were put to him. No confession is subject to determination by the jury as to voluntariness, and, secondly, as to compulsion.

The Court: It does not necessarily mean that in these

circumstances, considering the whole thing, there is no way I can determine if it is a voluntary statement from it.

Mr. Rossman: All the evidence is that it is voluntary.

The Court: Here is a case where he certifies he read it and hasn't read it. I listened to it very carefully for two days and I do not think it should be in. You are dealing with a confession here and I cannot allow it under those circumstances.

Mr. Rossman: Note our exception to the Court's ruling.

Mr. Vigil: If the Court please, since the district attorney has called the other psychiatrists, they have still another who has just shown up, and I think they should call him now.

The Court: They don't have to call him if they don't want to.

Mr. Rossman: We are offering that portion of Exhibit D which relates to the confession of Robert Gallegos.

Mr. Vigil: Now, if the Court please, with reference to Robert Galleges, we have other objections made in our [fol. 292] argument.

The Court: I think I have denied those.

Mr. Vigil: Here is our position with reference to this whole situation, if there is any reasonable doubt as to whether or not this statement should admitted, it should be resolved in favor of the defendant. The reason we cited this statute, which I think is proper in this situation, is that Robert is no more bound by it. This confession relates wholly and solely to the robbery, and without that the Juvenile Court would have nothing, and neither would this court.

The Court: I have ruled on that. There is no reasonable doubt in my mind regarding Robert, and that is why I feel it should be admitted.

Mr. Vigil: We have the other question of corpus delicti, how are they going to prove it? We have also a motion for suppression.

Mr. Rossman: We have proved the corpus delicti.

Mr. Vigil: They have to prove robbery. They have stated they were going to prove a vicious robbery.

Mr. Rossman: That is right.

Mr. Vigil: And they have to prove that independent of the evidence introduced in the Juvenile Court.

Mr. Rossman: We have to prove murder, that is what we have charged here.

The Court: I will deny Mr. Vigil's objection on that.

Mr. Vigil: Note our exception to the Court's ruling.

[fol. 293] The Court: The Court does find that People's Exhibit D may be admitted as to Robert Gallegos.

Mr. Rossman: We are willing to concede that this portion relating to Robert Gallegos is admissible, but is not admissible as to Eddie Martinez.

The Court: The only part to be read to the jury is that relating to Robert Gallegos.

Mr. Vigil: We object to the Court's ruling and note our exception.

Mr. Rossman: With the ruling of the Court on the statement as to Eddie Martinez, and as to his inability to testify, we have no way of proving anything against Eddie Martinez without the confession.

MOTION TO DISMISS CASE AGAINST EDDIE MARTINEZ AND GRANTING THEREOF

Mr. Vigil: If the Court please, then we ask the case be dismissed against Eddie Martinez in view of the District Attorney's statement.

The Court: Your position is, in view of the Court's ruling that the confession of Eddie Martinez is not admissible, there is no further case against him?

Mr. Rossman: That is correct.

Mr. Vigil: I move the charges against Eddie Martinez be dismissed.

The Court: In view of the position stated by counsel that there is no evidence presentable against Eddie Martinez, the motion of the defense attorney is granted and the defendant, Eddie Martinez is ordered remanded to the State Industrial School forthwith.

(Thereupon, a recess was taken to 10:00 o'clock Tuesday, June 16, 1959.)

[fol. 294] Tuesday, June 16, 1959 10:00 a.m.

Court convened pursuant to recess.

Appearances as heretofore noted.

Thereupon, the following proceedings were had, to-wit:

Mr. Vigil: I have, if the Court please, matters to bring before the Court.

OUT OF THE PRESENCE OF THE JURY IN CHAMBERS

Mr. Vigil: It appears, your Honor, that this boy was held in solitary for a period of seven days. The testimony from the Juvenile Hall will show the reason that he was held for the additional six days, and his mother attempted to see him on two or three occasions and was prevented, and the reason was co-operating with the police and in securing the statements, I presume.

The Court: My ruling will be the same, but you may, if you want to, bring it out by testimony before the jury.

Mr. Vigil: All right.

One other point I want to make here, and I think it was not clearly made yesterday, for the purpose of the record, I think that the Court's construction of this statute that we brought forth yesterday was to the effect this would not bar any testimony with reference to the robbery, which I think is the construction the Court gave it, would be reversible error, and I think we are all interested in seeing that the Court rules on the law in accordance with what the law is.

This particular statute has been construed before, once by Judge Frantz and once by Judge McWilliams. Judge [fol. 295] Frantz wrote a memorandum opinion and order, and in that memorandum opinion and order he held that the evidence was not admissible—as a matter of fact that was a case of aggravated robbery—and held that the charge could not be laid in the district court which was a different charge from that that had been presented in the Juvenile Court. I have here the file on the conspiracy case and the memorandum opinion Judge Frantz wrote, that covers that point. The memorandum opinion and order on the previous case, I have a copy of it before me, and that mentions this statute specifically.

I might state to the Court, I have checked all the cases

in Illinois this morning, and in the Supreme Court, on the question of this particular statute. The statute is exactly the same in the Illinois statute and no point has ever been raised in any Supreme Court and I think the statute is so clear that no one can possibly misconstrue it. I think this point is quite clear and the Court should consider the effect of it.

(Discussion off the record.)

Mr. Vigil: I think the objection here is, if the Court please, the effect of the statement is a confession of robbery, it could not have been a confession of murder because the death had not occurred. We are objecting to introducing any evidence of robbery before this jury that was the evidence given before the Juvenile Court.

The Court: I know, I have ruled on that.

(Discussion off the record.)

Mr. Vigil: If the Court please, I would like to move all [fol. 296] reference to the statement with reference to robbery be deleted for the reason this robbery has been submitted to the Juvenile Court, this defendant has been sent to the Industrial School by the Juvenile Court, and the evidence is wholly improper to be admitted before this Court as a part of his case.

The Court: The motion is denied for the reason that, as previously stated in the Court's ruling made yesterday, and for the reason, again, the Court will state it is the opinion of this Court the statute does not apply because the defendant is not being tried for the offense for which he was tried in the Juvenile Court, but that this is a new and entirely distinct offense and, in fact, this is an offense, namely, murder, of which the Juvenile Court does not, in the opinion of this Court, have jurisdiction to try. The Court believes the Juvenile Court has no jurisdiction to try the case of murder. In the first instance, therefore, the statute would not be applicable and under any circumstances there could be no double jeopardy because the Juvenile Court, as this Court reads the law, has no jurisdiction even to try a murder case.

Mr. Vigil: Note our exceptions to the Court's ruling.

IN THE PRESENCE OF THE JURY

[fol. 297] PAUL O. CHISM, called for further

Direct examination.

By Mr. Rossman:

The Court: Let the record show the witness has heretofore been sworn.

You understand you are still under oath?

The Witness: Yes, sir.

Q. State your name, please.

A. Paul O. Chism.

Mr. Vigil: Just a moment. If the Court please, may we have the Court exclude all witnesses?

The Court: The witnesses in this case are excluded in accordance with the former rule.

Q. You are the same person who was a witness in this case and called before during the course of this case?

A. Yes, sir.

Q. You took an oath at that time, did you not?

A. I did.

Q. What is your occupation?

A. I am a detective with the police department of the City and County of Denver.

Q. In what capacity?

A. I am assigned to the Juvenile Bureau.

Q. What do you do in connection with your duties in connection with the Juvenile Bureau?

A. We handle all cases pertaining to juveniles, more or less any delinquency actions, I would say.

Q. In that capacity, did you have occasion to come in [fol. 298] contact with the defendant, Robert Gallegos?

A. I did.

Q. Do you recognize him?

A. I do.

Q. Will you point him out?

A. He is the boy sitting right back here (indicating).

Mr. Rossman: Let the record show the witness has identified the defendant, Robert Gallegos.

Q. Did you have occasion to come in contact with him in connection with the death on one Robert F. Smith?

A. I did.

Mr. Vigil: I think, your Honor, the question should be ciarified, the question was, "in connection with the death of Robert F. Smith," and that has not been established at this point so far as this witness is concerned.

I object to the form of the question.

Mr. Rossman: I will withdraw the question.

Q. Did you have occasion to come in contact with him in connection with the death *on* one Robert F. Smith?

A. I did.

Q. When and where did you come in contact with the defendant?

A. January 1, 1959, approximately eight p.m. at 19th and Curtis, in Denver.

Q. And what were the circumstances of your investigation?

A. I was checking on a description that was on a record of an assault that was made on Robert Smith——

Mr. Vigil: We object, if the Court please, to anything [fol. 299] going into hearsay that this officer may have heard or read, and I ask the jury be instructed to disregard that answer.

The Court: You cannot consider any hearsay and you are to disregard the last answer. Objection sustained.

Q. As a result of that investigation, you say you came in contact with the defendant, Robert Gallegos?

A. Yes.

Q. At the time you came in contact with him, did you have occasion to discuss with him the question of the assault on Robert F. Smith?

Mr. Vigil: We object, if the Court please, the reference made to Robert Gallegos for the reasons we have advanced, and further there has been no foundation laid.

The Court: The objection is overruled for the reasons stated. I think you will have to lay a foundation.

Mr. Rossman: Yes.

Mr. Vigil: Note our exception to the Court's ruling.

Q. When and where did those discussions occur—just relate the place and time of those discussions?

A. The first occurred at 19th and Curtis. Upon seeing Robert, I asked him over to the car and in discussing the subject with him he admitted—

Q. No, you cannot say what he said, just when and where did these discussions occur?

A. The first was at 19th and Curtis, and the second was on the way to Juvenile Hall and at the Juvenile Hall before he was booked, and then again the next evening, [fol. 300] January 2d.

Q. All right. As to any questions that you asked or any discussion you had with him, were the answers or statements made by the defendant, Robert Gallegos, voluntary on his part?

A. They were.

Q. Were there any threats made, promises made, or hopes of reward extended to Robert Gallegos for giving you any answer to any questions which you propounded to him?

A. No, sir.

Q. Will you state what the substance was of the first conversation you had with Robert Gallegos?

Mr. Vigil: If the Court please, we object to the substance of the first conversation. The Court has ruled on this matter, and that is in the statement this witness is supposed to have testified to.

Mr. Rossman: I don't think the objection is any good.

Mr. Vigil: The Court has ruled on all of this, and I understood the Court's ruling was to the formal statement that finally resulted after all these questions was the final statement. We object to the oral statement, any oral statements that might be given based on the same objections we have heretofore made, plus the fact no foundation has been laid.

The Court: The objection is overruled.

Mr. Vigil: Note our exception.

Q. The Court has ruled you may testify, Officer, as to the conversation you had with Robert Gallegos on the [fol. 301] occasion, that is, on the evening of January 1st at 19th and Curtis Street.

A. He admitted to me—the conversation began in re-

gards to the assault on Robert F. Smith which I had an offense report on and I was investigating. In talking to Robert he admitted he had a part in it.

Q. Did he say what part he had in it?

A. He didn't at first, and that is the reason I booked him in Juvenile Hall.

Q. Did you have a subsequent conversation with him on the way to Juvenile Hall?

A. Yes, that more or less tied in with the information on the assault report.

Q. You had another discussion with him at Juvenile Hall, when was that?

A. January 2d.

Q. Will you tell the Court and jury the substance of that conversation?

A. It more or less would be extended and another party would be brought into it.

Q. You can state anything Robert Gallegos stated.

A. He told me he was in an assault with another man.

Mr. Vigil: If the Court please, we object to any testimony regarding any assault that has no bearing here. We ask this be stricken and the jury instructed to disregard it.

Mr. Rossman: If the Court please, all of a confession may be brought in to tend to show design.

The Court: I am ready to rule on it. I am familiar with [fol. 302] the law. Objection overruled.

Mr. Vigil: Note our exception to the Court's ruling.

The Witness: He admitted another assault, that is, took part in another assault on an old man at a hotel at 1851 Champa Street. He did say he didn't strike the old man, that he didn't have anything to do with that, but upon leaving the premises he proceeded down to 18th and Curtis Street where he was shining shoes; that upon seeing an old man, who was later identified as Robert F. Smith, he followed him to a hotel on 18th Street. He didn't know the name of the hotel or address.

Q. Did he say he was with anyone?

A. Yes, sir, he told me he was with his younger brother, Richard, and one Eddie Martinez.

Q. All right.

A. They followed the old man to the hotel and Richard stayed downstairs and watched out for cops. He and

Eddie went upstairs and they lost track of the old man; they asked several if they had seen his grandfather come in, that he had just come in and was drunk, and one party, who later turned out to be a Mr. Harper that works there, he said he told the boy he went down the hallway——

Mr. Vigil: If the Court please, it appears quite clearly this witness is talking about an independent party.

The Court: He is talking about what the defendant talked to him about.

Mr. Vigil: That is the purport of it. The witness has stated——

[fol. 303] The Court: Are you testifying about what Robert told you?

The Witness: Yes, sir.

Mr. Vigil: This is a narrative statement. He is relating something where he states that Robert stated Mr. Harper told him to go down the hallway. This is improper. Bobby didn't know this man's name.

The Court: Clear it up.

The Witness: This is an error on my part in bringing in the name.

Q. With the exception of the name, are you testifying to what Robert Gallegos told you?

A. Yes, I am.

Mr. Rossman: We ask that the reference to Mr. Harper be stricken and the jury be instructed to disregard that reference.

The Court: The jury will disregard the reference to Mr. Harper. This has to be confined and the question is just what the defendant told you.

Q. Go ahead and state what he told you.

A. He told us that upon inquiring as to the old man that just came in, that is, his grandfather, a man told us he just went down the hallway, and upon knocking on the door a man opened the door and he told him he was looking for his grandfather, that he was drunk, and the man told him the old man next door had just come in. He said upon knocking on the other door someone told him to come in, that he opened the door and he seen it was the man he was looking [fol. 304] for. He said at that time Eddie Martinez asked

the old man for a dink of water and when the old man brought the water Eddie grabbed him and he, Robert, hit the old man about the head and face with a shoe brush; that when the old man fell to the floor he took a knife and held it at the old man's throat and took his billfold out if his back pocket.

Q. Did he say what they then did?

A. He said they all left then and went to the Twenty-third Street Viaduct where he gave Eddie $3.00 and he kept $10.00 to split between him and Richard and they then went home; that he threw the billfold and the brush over the Twenty-third Street Viaduct, which was never located.

Q. This conversation occurred on January 2, 1959, is that correct?

A. Before the day of the arrest which occurred the night of January 5th.

Q. What happened on that occasion?

A. I would like to clarify one thing. The information that I had obtained, I sent a report to Juvenile Court on this first information, and then on January 5th the victim of the other assult identified the parties at Juvenile Hall and that time upon taking the other victim home I was called to Juvenile Hall that Richard wanted to see me. That is when he told me about the assault and I sent an additional report to Juvenile Court at that time.

Q. Did you have occasion to go to the defendant's home? [fol. 305] A. Yes, on January 1st I returned Robert's brothers to his home because Robert told me Charles didn't have anything to do with it, that his cousin, Eddie Martinez, was the boy that was with them; that on December 19th Eddie came over to their house and stayed all night and they, on December 20th, had went downtown and did these acts.

Q. Did these two assaults occur on the same date?

A. Yes, they did.

Q. What date was that?

A. December 20, 1958.

Q. Did you have any occasion at another time to go to Robert's house?

A. I returned there, I believe, on January 5th. Upon the

boys telling me about the assault, I returned to the house and obtained a shoe brush.

Q. I show you what has been marked for identification purposes as People's Exhibit E and ask you if you can identify the Exhibit?

A. Yes, I can.

Q. What is it?

A. It is the shoe brush that I obtained from the home of Robert Gallegos.

Q. On what date?

Mr. Vigil: If the Court please, we object to any more evidence or any identification of this shoe brush. This officer has already testified with reference to a shoe brush that was thrown over the viaduct and was never recovered, and now he is seeking to show another brush. We object to any more testimony about it.

[fol. 306] The Court: The objection is overruled.

Mr. Vigil: Note our exception to the Court's ruling.

Q. Did you subsequently take the shoe brush to Juvenile Hall?

A. Yes. I recovered this—there was an error on my part—I thought it was the 5th, it was the 7th I took this to Juvenile Hall where Robert and Eddie Martinez told me—

Mr. Vigil: We object to anything Eddie Martinez told you.

The Court: Objection sustained.

Q. Just what Robert told you?

A. Robert stated this was the Brush Eddie had used on the first victim.

Mr. Vigil: If the Court please, this is wholly improper as to what Robert told him about Eddie.

The Court: I think the objection is probably well taken.

Mr. Rossman: I don't understand the ruling, and I would like to have a hearing on it.

The Court: Come here a second.

(Colloquy of Court and counsel at the Bench.)

The Court: The objection will be overruled.

Mr. Vigil: Note our exception to the Court's ruling.

Q. Will you state what he told you about that exhibit?

A. Robert told me this was the brush that Eddie Martinez used on the first assault on the first man.

Q. Who was the victim of the first assault?

A. Mr. John Kruhd.

[fol. 307] Q. Where did he live?

Mr. Vigil: We object, if the Court please, to anything with reference to this first assault that is given by this witness with reference to what, if anything, Robert Gallegos may have had to do in that assault.

The Court: Is this what Robert told him?

Mr. Rossman: As to the last two questions, no, your Honor.

The Court: I thought this was to be related by the witness as to what Robert told him.

Mr. Rossman: We will withdraw the last two questions.

Mr. Vigil: I ask the jury be instructed to disregard the last two questions and answers.

The Court: The jury will disregard the last two answers.

Mr. Rossman: That is as to the name.

Q. Subsequently, did you have occasion to see Robert again on January 7, 1959?

A. I did.

Q. What were the circumstances at that time?

A. I took a formal statement to Juvenile Hall for him to sign.

Q. Did he sign it in your presence?

A. He did.

Q. Did you have any conversation with him at the time of the signing of the formal statement?

A. The only thing I can recall as far as conversations with Robert was to the extent that the Sergeant asked me to [fol. 308] bring the statements out, that he would be willing to sign them, and asked him if he would sign it, which he did.

Q. Did he read it?

A. He did.

Q. In your presence?

A. He did.

Q. Did he read it aloud?

A. He read it out loud. He read it to himself, his brother, Richard, was there and also Eddie Martinez.

Q. Did you hear him read it?

A. I did.

Q. I hand you what has been marked for identification purposes People's Exhibit D, and ask you if you can identify the Exhibit?

A. Yes, sir, this is the statement that I took to Juvenile Hall for Robert to sign.

Q. Did you make any threats to him at that time in order to obtain his signature on that statement?

A. I did not.

Q. Did you make any promises to him?

A. No, sir.

Q. Did you give him any hopes of reward of any kind should he sign this statement?

A. No, sir.

Q. Did he sign it in your presence?

A. He did.

Q. Was his signature affixed voluntarily in your presence?

A. No.

Q. Did he sign it voluntarily?

[fol. 309] A. He most certainly did.

Q. Did you then take the statement with you?

A. I did.

Q. Where did you take it?

A. I returned it to the Juvenile Bureau.

Q. After that time did you have occasion to see Robert Gallegos again officialiy?

A. I did.

Q. Now, officer, you stated that on one of the occasions that a certain individual went out to Juvenile Hall with you. Is that correct?

A. That is correct.

Q. And identified Robert Gallegos at that time?

A. Yes.

Q. Who was that individual?

Mr. Vigil: Now, if your Honor please, we object to anything that might have been done at Juvenile Hall. That is hearsay.

(Argument of Counsel.)

The Court: That is not the question. The question is, "Who was the individual?"

Mr. Vigil: He stated previously that a certain individual went with you to Juvenile Hall.

The Court: The objection is overruled.

Mr. Vigil: Note our exception.

Q. Who was that individual?

A. Mr. John Kruhd.

Q. Where did he live?

A. 1851 Champa Street, Denver.

[fol. 310] Cross-examination.

By Mr. Vigil:

Q. How long was Bobby Gallegos kept in solitary confinement before he gave you this final statement?

A. Which statement do you mean, Mr. Vigil?

Q. This one that you referred to?

A. I couldn't say, I don't have any knowledge of how long he was in security.

Q. He was in soiitary confinement up to the day he signed it, wasn't he?

A. Not to my knowledge.

Q. And the day he signed it you released him?

A. I don't have anything to do with them out there. That is under the jurisdiction of the Juvenile Court.

Q. As a matter of fact, you told them told hold Robert Gallegos in solitary until he made this statement, did you not?

A. Most certainly not.

Q. And they do co-operate with the police officers when they are out there——

Mr. Rossman: I object to the form of the question, as it is wholly improper and immaterial. It is whether they did that in this case.

The Court: It is really what they did in this case.

Q. But they co-operated with you in holding this boy, Robert Gallegos, by holding him in solitary?

A. They held him in solitary, as you put it, which is [fol. 311] security, by the rules of Juvenile Hall. I didn't have anything to do with that.

Q. It is security, as you put it, a room where they keep a man where he cannot talk to anybody?

A. That is correct.

Q. Cannot see anybody?

A. No, sir.

Q. And in this particular instance, the mother of Bobby Gallegos went there on three occasions and was not permitted to see him, was she?

A. I don't know that.

Q. You didn't tell him he could have a lawyer, did you?

A. I told his mother.

Q. He is the one that gave the statement, isn't he?

A. Yes.

Q. And you didn't tell him that, did you, that he could have a lawyer?

A. No, sir. I didn't have anything to do with the statement except for him signing it.

Q. This statement actually was taken from three boys, isn't that true?

A. I wasn't there, I couldn't say.

Q. I am talking about your statement, the statement you were talking about originally, the statement you stated you took?

A. The one for Juvenile Hall?

Q. Yes.

A. Yes, I took information from all three and made the report to Juvenile Court.

[fol. 312] Q. So they could take some action, isn't that right?

A. In regard to the assault and robbery, yes.

Q. Now, as a matter of fact, that statement was made by all three boys that you have testified to here. Isn't that correct?

A. Yes, sir, that is correct.

Q. Haven't you already testified you couldn't separate what one boy told you from what the other boys told you?

A. No, sir, you misunderstood me. I said I couldn't pick it all out.

Q. In other words, there were three boys sitting there and you questioned them, and you could pick out some of what Robert told you, some of the answers Eddie told you, and what Richard told you?

A. Yes, sir.

Q. And now your testimony is that this statement is what Robert told you?

A. No, sir.

Q. You don't have a separate statement from Bobby, do you?

A. I didn't take this statement.

Q. You don't have a separate statement from Bobby, yourself, do you?

A. No, sir.

Q. You took a combined statement for all three boys?

A. Yes, sir.

Q. And that is what you are testifying to here, is the combined statement?

A. No, sir.

[fol. 313] Q. How can you separate what Bobby told you from what the other two boys told you?

A. I have a memory and I remember talking to the boy and I can remember what he told me.

Q. They were all sitting together when you questioned them?

A. Part of the time.

Q. And as far as you are concerned, the statement that you secured first was from Charles—rather from Richard. Isn't that correct?

A. No, sir, I have never taken a statement from either one of the boys. There is the statement (indicating). I didn't have anything to do with that except for them signing it.

Q. I am talking about the statement you took originally when you were down on 19th and Curtis?

A. I took information, not statements.

Q. All right, we will call it information. The information you took from these boys you took first from Richard. Is that correct?

A. No, I wouldn't say that is correct.

Q. He was the first one that talked to you about this, isn't that true?

A. That is a little different. All three boys were in the car, and upon asking what happened, Richard is the first one that mentioned about what happened, then Robert told me.

Q. You had Richard, Robert and Eddie in the car?

A. That is correct.

Q. And Richard is about eight years old?

[fol. 314] A. About that, I don't recall.

Q. And he is the first one that gave this information for you?

A. Yes.

Q. And based on that information you secured, you immediately took them to Juvenile Hall and asked they be put in solitary?

A. Most certainly not. I had nothing to do with putting them in solitary.

Q. You know they are placed in solitary, don't you, when you take them to Juvenile Hall?

A. Yes, for twenty-four hours. That was on the order of the Court.

Q. But in this particular case Robert was kept there seven days?

A. That I do not know.

Q. When you first questioned these three boys, your first questioning was with regard to this man that you have identified as Kruhd, isn't that correct?

A. No, sir, he didn't enter the picture—that offense report didn't enter the picture until the following day. I didn't even know anything about it until after the officers told me they had a similar assault on Champa Street and asked me to ask them about it.

Q. Did you ever mention the name of the hotel, or did you always use the street address?

A. Sir.

Q. Did you mention the name of the hotel, or did you always use the street address in questioning these boys?

[fol. 315] A. As I recall, I used the address.

Q. Now, when you first approached these boys on the street, what were they doing?

A. They were sitting down at the corner of the building at that location.

Q. And what did they have?

A. They had a shoeshine kit.

Q. Had you previously taken a shoeshine kit away from them?

A. No, sir.

Q. What was in the shoeshine kit?
A. A couple cans of polish, a shoe brush and a shine rag, I believe it was.
Q. Did you tell them you were a police office and show them your badge?
A. I told them I was a police officer; I didn't show them my badge.
Q. Will you stand up and show this jury your gun, where you carry it?
A. (Witness complies.)

Mr. Vigil: That is all:

Redirect examination.

By Mr. Rossman:

Q. On January 1st, was it cold?
A. No, sir, it was fairly nice out.
Q. What were you wearing?
A. I know I had a light topcoat on and my suit coat.
Q. Where was your gun with relation to the clothes you were wearing?
[fol. 316] A. It was in the same place it is now, under my coat.
Q. Did you show it to Robert Gallegos?
A. No, sir.
Q. Or either of his brothers?
A. No, sir.
Q. Then, or at any other time?
A. No, sir.

Mr. Rossman: That is all.
Mr. Vigil: No further questions.

(Witness excused and cautioned by the Court.)

CHARLES W. MILLER, called as a witness by the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. State your name, please.

A. Charles W. Miller.

Q. Your occupation?

A. Sergeant of detectives, assigned to the Juvenile Bureau, Denver Police Department.

Q. How long have you been with the Police Department?

A. The past ten years.

Q. How long have you been assigned to the Juvenile Bureau?

A. The past two years.

Q. Hoy long have you been a sergeant?

A. The past two years.

Q. Calling your attention to the matter relating to the [fol. 317] death of one Robert F. Smith, did you have anything to do with that case?

A. I did, sir.

Q. What did you have to do with that case?

A. I took a statement from the defendant, Robert Gallegos, regarding the case.

Q. When and where did you take that statement?

A. The statement was taken the morning of January 7th in the Juvenile Bureau office at the Denver Police Department.

Q. Now, Sergeant, prior to the taking of the statement, did you have occasion to talk to Robert Gallegos about taking such a statement?

A. I did not.

Q. Did you have occasion to see him at any time prior to January 7th?

A. I believe I saw him at the Hall and knew who he was, but I didn't have occasion to talk to the boy.

Q. When did you first see him, then, with reference to the statement?

A. I received——

Q. No, just when?

A. The morning of January 7th.

Q. And where was that?
A. That was at Juvenile Hall.
Q. Did you have any conversation with him at that time?
A. I did.
Q. What was that conversation?
A. I told Robert that Mr. Smith—I was informed Mr. Smith was in a critical condition at Denver General Hos-[fol. 318] pital and not expected to live, and I told him it was my job to attempt to get a formal statement for the record in the matter. I told him if he wanted to bring his parents with him while he gave this statement, that was all right, and I told him if he wanted an attorney to accompany him to the Police Building it was up to him and that if he didn't want to make a statement he didn't have to.
Q. Did Robert go with you to the Police Building?
A. Yes.

Mr. Vigil: I think Robert's answers—what were his answers, did Robert agree to accompany you to the Police Building?

Q. Did he agree to accompany you to the Police Building?
A. He did.
Q. What time was that, do you have any idea?
A. It was approximately 9:30 in the morning. That should be, if I don't know the exact hour, I believe it is on the statement that was taken.
Q. Was a statement subsequently taken?
A. A statement was subsequently taken.
Q. Who asked the questions?
A. I directed the questions.
Q. As far as the statement of Robert Gallegos is concerned, who gave the answers?
A. Robert Gallegos gave the answers.
Q. Were they given voluntarily?
A. They were.
Q. Did you make any threats or promises to Robert Gallegos?
[fol. 319] A. I did not.
Q. Did you extend to him any hope of reward if he gave the statement?
A. I did not.

Q. Did you ask him if he would read and sign the statement?

A. I informed Bobby it would be necessary to sign the statement. I wasn't present at the signing.

Q. Did you tell him it could be used against him in court?

A. I did.

Q. I hand you what has been marked for identification purposes as People's Exhibit D, and ask you if you know what the Exhibit is?

A. Yes, sir. This is the statement that I took from Robert the morning of January 7th in my office.

Q. Who all was present at the time?

A. During the actual statement taking, there was Robert present, Eddie Martinez was present, Richard Gallegos, Robert's younger brother, was present and the stenographer that we had to borrow from the Detective Bureau that took the statement.

Q. Are the questions which appear on Exhibit D the questions which you asked of Robert Gallegos?

A. Yes, sir.

Q. Are the answers which appear on Exhibit D the answers given by Robert Gallegos?

A. They are.

Q. After the statement was reduced to writing, what did you do with it?

[fol. 320] A. After the statement was reduced to writing, that was sometime in the afternoon, I know, and I gave it to Detective Chism and told him inasmuch as he was just coming on duty to take it to Juvenile Hall and see if the boys would sign it for him.

Mr. Rossman: I offer People's Exhibit D in evidence.

Mr. Vigil: If the Court please, we object for the same reasons heretofore stated.

The Court: The objections are overruled for the reasons previously stated by the Court. Exhibit D is received in evidence.

Mr. Vigil: Only the portion that relates to Robert Gallegos is received in evidence, is that correct?

The Court: I think Exhibit D only relates to Robert Gallegos.

Mr. Rossman: That is all, your Honor. No further questions.

Cross-examination.

By Mr. Vigil:

Q. You stated you told Robert Gallegos several things upon your first meeting with him, including the fact that he could have a lawyer, if he wanted one; that he could have his parents present, if he wanted; that he didn't have to say anything if he didn't want to. Did you make and use this as a part of the general statement, or did you just ask him?

A. No, sir. We were out at Juvenile Hall and I asked the three boys—they were brought down—and at that time I told them it was my job to attempt to obtain a state-[fol. 321] ment and at that time I outlined what I have previously said.

Q. This was all done after he had been in solitary confinement for seven days?

A. I don't know anything about where the boy was or had been. It is not the Police Department's policy to put those boys anywhere out there. We did not maintain supervision.

Q. Don't you request the attendants at Juvenile Hall to hold them in solitary for you when you think it might be beneficial?

A. There are cases where we can ask for a privilege to be revoked, but I don't understand solitary.

Q. You understand where a man is alone and he is kept there day after day, isn't that solitary?

A. The boy eats in the diningroom downstairs.

Q. Just answer the question as to whether he is kept in a room alone?

A. I believe they are kept in a room alone, yes, sir.

Q. Now, with reference to your first request as to whether or not he wanted a lawyer, what did Robert say to that, did he answer it at all?

A. Yes, they shook their heads—I mean they gave me no indication.

Q. So when you asked if they wanted their parents, they shook their heads, did they?

A. They didn't indicate they wanted them there.

Q. And when you told them it had to be voluntary, what did you say?

[fol. 322] A. I told them they didn't have to come with me to the Police Building, and they said they wanted to go.

Q. You questioned the three boys, did you not?

A. At headquarters, I did, yes.

Q. And there were three boys at Juvenile Hall?

A. The same three boys.

Q. This occurred on January 7th?

A. Yes, sir.

Q. And you took them from Juvenile Hall accompanied by another officer?

A. Accompanied by Lieutenant Gartland.

Q. And you drove to the Police Building?

A. We did.

Q. And you took them to the police building with all the police officers around the building and took them to the Lieutenant's room?

A. It is customary for police officers to be at the Police Building, but our room is open for anyone to come in. We closed the door during the statement so as not to be interrupted.

Q. And then you questioned all three of them?

A. That is correct.

Q. But the first one you questioned was Richard, this eight year-old, isn't that correct?

A. No, sir.

Q. Who was the first one you questioned?

A. The first one I questioned?

Q. The first one you questioned?

A. To the best of my knowledge that is the way it is [fol. 323] there (indicating) if you want to look at it.

Q. You mean, when you were out at the Juvenile Hall you hadn't talked to Richard first?

A. I talked to all three of them at Juvenile Hall. The questions on that statement I directed first to Robert Gallegos as is shown there as was taken down by the stenographer. I believe I talked to the youngest boy last.

Q. And you were investigating at that time a robbery, is that correct, an aggravated robbery?

A. Sir, the Juvenile Bureau does not handle homicides. I was called by the Detective Bureau by the Captain of Detectives and told to obtain a statement from these boys because Mr. Smith was in a critical condition. This was

not presented in Juvenile Court, it was taken expressly for the purpose if Mr. Smith expired.

Q. At that time Mr. Smith had not expired?

A. No, he had not.

Q. And you were investigating something that was a matter of the Juvenile Court. Isn't that correct?

A. I was investigating regarding a man who was in the hospital in a critical condition.

Q. You were not investigating a man who was in the hospital in a critical condition, you were talking to Bobby Gallegos, were you not?

A. It was my assignment they knew something about here. He was in that hospital, sir.

Q. As a matter of fact, Detective Chism did subsequently testify in the Juvenile Court, did he not?

A. I understand he did, yes, sir.

[fol. 324] Q. Had you previously talked to Richard at Juvenile Hall?

A. Yes, sir.

Q. What date was that?

A. I believe it was the evening of January 3d.

Q. And Richard was the boy eight years old?

A. He was the eight year-old, yes, sir.

Q. And you were able to secure from Richard certain information, were you not?

A. As I previously stated, Mr. Vigil, I was out at Juvenile Hall and I was informed by the attendant that Richard wanted to talk to one of the Juvenile Hall officers. I said, "Here I am, what did you want to talk to me about, what did you want to tell me."

Q. So, the questions you asked of Robert were based on the information you received from Richard. Isn't that correct?

A. No, sir. The information I obtained from Richard I gave to Detective Chism.

Q. So far as you are concerned, you knew none of that information?

A. What information?

Q. That Richard gave you, you used none of that information in questioning Robert?

A. Mr. Vigil, supervising the Juvenile Hall, I am more or less familiar with Mr. Chism's report. I had a knowledge of what was going on, yes, sir.

Q. Your reports are used in the Juvenile Court, aren't they?

[fol. 325] A. Possibly.

Q. Your reports are used in the Juvenile Court, is that correct?

A. The Juvenile Bureau reports are sent over there.

Q. Did you use the information Richard gave you in order to question Robert Gallegos?

A. No, sir. This was a questioning—I believe it is self explantory—they are asked to tell what happened, and I came up with a question——

Q. Just a moment, answer the question. Did you use the information Richard gave you to propound the questions to Robert?

A. No, sir.

Q. Were there any fingerprints taken?

A. Fingerprints?

Q. Yes.

A. Not to my knowledge, sir.

Q. Any billfold found?

A. Not to my knowledge.

Q. Any money found?

A. I don't know, sir, it has been six month. I don't recall.

Q. Are you familiar with the address of this hotel?

A. 1229—18th Street?

Q. I presume, is that the address?

A. To the best of my knowledge.

Q. Do you know what type of hotel it is?

A. Yes, sir.

Mr. Vigil: That is all.

[fol. 326] Mr. Rossman: No further questions.

The Court: Thank you, Sergeant Miller.

(Witness excused and cautioned by the Court.)

Mr. Rossman: I ask leave of Court at this time to read to the jury Exhibit D.

Mr. Vigil: We renew our objections for the reasons heretofore stated.

The Court: Overruled.

Mr. Vigil: Note our exception.

Mr. Rossman: Ladies and gentlemen of the jury, I am reading from Exhibit D:

"Case No. 290463, Juvenile Bureau Police Building, 13th and Champa Streets, Denver, Colorado.

"January 7, 1959.

"Statement taken in Lieutenant Gartland's Office, Room 209, Police Building, 13th and Champa Streets, Denver, Colorado, January 7, 1959, at approximately 9:35 a.m. in the presence of the following witnesses:

"C. W. Miller, Sergeant of Detectives.

"E. Martinez, Hearings Reporter.

"Statement made by Robert Gallegos, age 14, of 2654 Stout Street, Denver, Colorado.

"Questioning directed by Sergeant C. W. Miller to Robert Gallegos:

"Q. What is your name?

"A. Robert Gallegos.

"Q. How old are you?

"A. 14.

"Q. When were you born?

[fol. 327] "A. 1944.

"Q. Give me the complete birth date?

"A. 1944, March 25th.

"Q. Where do you live?

"A. 2654 Stout.

"Q. All right, at this time, Robert, I call your attention to Case No. 290463, wherein one Robert F. Smith, of 1229—18th Street, City and County of Denver, Colorado, was the victim of an aggravated robbery. This robbery offense took place in Apartment No. 45, at 1229—18th Street. This said offense occurred between 8:30 p.m. December 20, 1958, and 9:00 p.m. December 20, 1958. Now, I'll ask you, Robert, if you know anything about this assault and robbery. Just tell me in your own words.

"A. All of us three was shining shoes, and we wasn't making much money, and when we were coming Eddie thought of getting the old man's money.

"Q. You three were shining shoes and not making too much money, is that correct, and you say Eddie Martinez thought of a plan to rob an old man, is that correct?

"A. Yes. Then we saw this man. He was sort of a drunk. We thought he had some money, so we followed him up to this room.

"Q. You followed him to his hotel room?

"A. Yes.

"Q. That was 1229—18th Street, Apartment 45?

"A. Yes. When we went inside, we knocked on the door.

"Q. Who is "we"?

[fol. 328] "Q. Me and Eddie. And we said "Can we have a glass of water?", and as soon as he went to get the water, Eddie grabbed him, and I hit him.

"Q. What did you hit him with?

"A. I had a suede brush.

"Q. Suede shoe shining brush?

"A. Yes. Then he hit the bed, then fell to the floor. We took his money, his wallet, in his back pocket. As soon as we took the money, Eddie said 'Let's cut out'. We ran down stairs and down by the bridge, so we split it up three ways. I got $3.

"Q. You say you split his money up down by a bridge?

"A. 23rd bridge.

"Q. The 23rd Street viaduct, is that right?

"A. Yes.

"Q. Where was Richard during this assault?

"A. Downstairs.

"Q. Why was he downstairs?

"A. Watching if any cops come.

"Q. He was serving as a lookout?

"A. Yes."

The signature of Robert Elmer Gallegos appears on page 5. The following also appears:

"I certify I have read the above statement and have signed it and the signature thereon is mine and this statement is entirely true. The statement was made voluntarily after I was duly warned by Sergeant Miller that it could and may be used against me in [fol. 329] court. There were no promises made to me or threats made against me in obtaining this statement."

The signature of Robert Elmer Gallegos then appears in writing.

In our order of proof we have some witnesses coming. Maybe we now could take a recess.

(A short recess was taken.)

COLLOQUY

OUT OF THE PRESENCE OF THE JURY IN CHAMBERS

Mr. Rossman: Let the record show that I have informed the Court and counsel that, in accordance with our proposed order of proof, we intend to call as witnesses for the People Doctors Cohen and Rymer, who are endorsed on the information, and that it is our feeling at this time that we will not call Doctor Tepley and that I have made this fact known to Court and to counsel.

Mr. Vigil: We have already objected to the calling of any psychiatrists and we have previously stated our position, that these doctors were appointed at the instance of Bobby Gallegos and Eddie Martinez, and, of course, at this time only Bobby Gallegos is the only defendant and we feel since they were appointed under no plea of insanity, in fact, but for the purpose of assisting counsel in the defense of this matter, that these doctors bear a confidential relationship to the defendant, Bobby Gallegos, and under the law that the prosecution is not entitled to call these witnesses. The argument we made heretofore is clear, that if Bobby Gallegos had been in position to hire his own psychiatrist the prosecution under no circumstances could [fol. 330] have called the psychiatrists to testify against him, which is the effect of their testimony, and they are seeking witnesses that bear a confidential relationship to the boy, Bobby Gallegos, and we are claiming this privilege at this time.

We also object to the prosecution attempting to call, as has been stated, two of the witnesses that they feel are favorable to the prosecution when they previously stated the witnesses are court witnesses, and we object to this on the grounds these witnesses are not court witnesses, but witnesses who have been called and are witnesses of Bobby Gallegose if they are anybody's witnesses, and we

are being specific about calling any of them; but if they call any of them, we ask they call all of them, because that is the only way all of the testimony could be before the Court in connection with this matter.

The Court: The objections are overruled.

Mr. Rossman: In this connection, if the Court pleases, in connection with Section 40-1-3, C. R. S.,

> "Who deemed of sound mind.—A person shall be considered of sound mind who is neither an idiot, nor lunatic, nor affected with insanity, and who has arrived at the age of fourteen years, or before that age, if such person knows the distinction between good or evil."

My understanding of this statute is that Bobby Gallegos, the evidence showing to the extent if it does—in any event that he has reached the age of fourteen, would be considered to be of sound mind under the ordinary circumstances of the case, but inasmuch as he was just [fol. 331] barely that age and it is a close question. That is the reason we are calling witnesses in furtherance of this fact.

Mr. Vigil: If the Court please, we object to the prosecution calling witnesses on something he deems is a close question and we feel this testimony is wholly immaterial and improper and would only confuse the jury and so is inadmissible. It could not prove or disprove anything at this stage of the proceedings.

(Discussion off the record.)

Mr. Vigil: So far as I am concerned, the statement they have introduced with regard to the age must be the age they are relying on, and if so, that is the fact that has been already introduced on the part of the prosecution. They must make the evidence. I could not by any stipulation stipulate away the rights of my client and I refuse to do this; but what I am saying, what they have done is that the defendant makes the distinction between good and evil in their proof.

The Court: The Court will state for the record that the objection which the Court previously overruled when

the Court ruled the doctors would be allowed to testify, no longer applies because that is no longer an element.

Mr. Rossman: I offer into evidence People's Exhibit E, the shoe brush.

Mr. Vigil: To which we object because the shoe brush was not identified that it was used to strike a man and it was at the house. There is no showing as to how it was picked up; it is not something that was gotten at the scene of the crime; it is something that apparently is [fol. 332] going to be used, apparently a shoe brush like this.

Mr. Rossman: There has been testimony related by the police officer as to a similar offense. Under the testimony the exhibit is admissible. This shoe brush was later identified by the same person who gave the statement concerning the similar offense.

What I propose to do, I am in a position to call a witness to a similar offense into Court, and I am trying to avoid doing this if the offer is good and the evidence is admissible with reference to the shoe brush.

The Court: I think the exhibit is admissible, and People's Exhibit E is admitted into evidence.

Mr. Vigil: Note our exception to the Court's ruling.

In the Presence of the Jury

Mr. Rossman: Your Honor, we ask leave of the Court at this time to introduce into evidence People's Exhibit E.

Mr. Vigil: If the Court please, we make our objection on the grounds that this is introduced, according to the statement previously made, on the basis of a similar offense. That this similar offense has not been established. First of all, our objection is that this is a murder trial and the similar offense is an offense of robbery, and we object.

The Court: Objection overruled. Exhibit E is admitted into evidence.

Mr. Vigil: Note our exception to the Court's ruling.

Mr. Rossman: We ask leave to pass Exhibit E to the jury.

[fol. 333] The Court: You may pass Exhibit E to the jury.

(Colloquy of Court and counsel at the bench.)

Mr. Rossman: If the Court please, at this time the People rest.

Mr. Vigil: If the Court please, we have motions that we would like to make.

The Court: Ladies and gentlemen of the jury, the defense has motions they wish to make now at the conclusion of the People's evidence. We will recess until tomorrow morning so far as the jury is concerned.

Thereupon, a recess was taken to Wednesday, June 17, 1959, at 10:00 o'clock a. m.

[fol. 334] Wednesday, June 17, 1959 10:00 a.m.

Court convened pursuant to recess.

Appearances as heretofore noted.

Thereupon, the following proceedings were had, to-wit:

MOTION THAT ALL THE EVIDENCE BE STRICKEN, ETC. AND RULING THEREON

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

Mr. Vigil: May it please the Court, at this point in the proceedings the defense asks that all of the evidence be stricken and held for naught in this case, for the reasons that all the evidence given is irrelevant, immaterial and improper, does not prove or tend to prove any element in the case, and furthermore that the statements purportedly made by the defendant, Bobby Gallegos, which are hearsay as a matter of fact, are one of the exceptions to the hearsay rule which have been shown to have been involuntarily given because of the situation existing, and with regard to the testimony of the witnesses—we can start with the first one that was produced.

That witness did not testify to anything material to this case, the witness that supposedly saw two boys in the hallway couldn't identify either of them, and on cross examination said, "I don't know who they were." So that evidence is clearly immaterial and inadmissible.

The evidence of the hotel clerk is of no effect, it doesn't prove anything. And so the only thing we are left with here is the possibility of the statements, and we ask, for reasons we have heretofore advanced, that the statements be stricken and held for naught.

I think the Court can recognize the points I am making [fol. 335] with regard to the testimony.

Now, the fact that we had doctors testify, the doctor's testimony is of no concern because his testimony is the only opinion testimony.

The Court: The motion is denied.

Mr. Vigil: Note our exception to the Court's ruling

MOTION TO DISMISS AND FOR A DIRECTED VERDICT AND DENIAL THEREOF

We want to make a motion to dismiss and for a directed verdict, and in this motion we should like to incorporate the same argument that we have heretofore made, and in addition to that we should like to point out in this case that the prosecution has wholly failed to make out a case of corpus delicti based on the evidence that has been adduced to connect Bobby Gallegos with the facts that they attempted to show by his alleged confession.

Now, in this case, the prosecution, although we agree they have charged all degrees of murder, it is quite apparent from their opening statement that they sought to prove a murder committed during a robbery. They have wholly failed to prove the robbery based on the fact that they had to establish by independent evidence, not by the statements, that there was a robbery committed by Bobby Gallegos.

No witness has said these boys were there, either one of them. I don't think there is any evidence at all to that effect.

The only evidence we have at this point is based on their saying there was a death. That is opinion evidence, because the death certificate shows, and is uncontradicted, that the cause of death was bronchial pneumonia. Then we have only the statement of Bobby Gallegos. There is [fol. 336] no question at all that an uncorroborated statement is insufficient for the purpose to show first degree murder, and, of course, this rule has been in effect for a long, long time.

(Further argument of counsel and citation of authorities.)

The Court: The motion will be denied.

Mr. Vigil: Note our exception to the Court's ruling.

IN THE PRESENCE OF THE JURY

And Thereupon the Defendant, to Sustain His Plea of Not Guilty Herein, Gave and Offered in Evidence as follows:

MARIA LUCY GALLEGOS, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?
A. Maria Lucy Gallegos.
Q. Where do you live?
A. 2654 Stout Street.
Q. And, are you married?
A. Yes.
Q. To whom are you married?
A. To Encelmo Gallegos.
[fol. 337] Q. How long have you been married?
A. Nineteen years.
Q. Where were you married?
A. Here in Denver, Colorado.
Q. At what church, or what place?
A. Our Lady of Victory Catholic Church.
Q. Is that in Denver, Colorado?
A. Yes.
Q. What does your husband do?
A. He is a construction worker.
Q. Is he presently working?
A. Yes.
Q. How many children do you have?
A. Thirteen.
Q. Thirteen children?
A. Yes.
Q. What size house do you have?
A. A six room house.
Q. Do you own it or rent it?
A. We rent it.

Q. Do all your children live at home?

A. Yes.

Q. Are you the mother of Bobby Gallegos?

A. Yes, sir.

Q. What is his full name?

A. It is Robert Encelmo Gallegos, but they always call him Elmer. That is the second name of my husband.

Q. Do you recall—by the way, where does Bobby stand in the order of the children, is he the eldest or youngest?

A. He is the oldest of the boys. I got two older girls, [fol. 338] older than he is.

Q. Now, do you recall when Robert was taken to the Juvenile Hall?

A. Yes, he was taken to Juvenile Hall.

Q. When he was first there did you go to see Robert?

A. I went on the second of January and when I got there they told me I couldn't see Robert because he was under investigation.

Q. He was under investigation?

A. Yes, that I couldn't see him until the visiting days, and then they told me the visiting days was on Mondays and Thursdays from seven to eight, but I couldn't see him until Thursday.

Q. Then did you go back to try to see him?

A. Me and my husband went on Thursday and that is when they let us see him.

Q. Had you been there previously?

A. Do you mean——

Q. How many times did you go there that they didn't let you see him?

A. Just the second.

Q. When were you told Robert was there?

A. It was on January 1st, it was about 11:30.

Q. Eleven thirty at night or morning?

A. At night.

Mr. Vigil: That is all.

[fol. 339] Cross-examination.

By Mr. Rossman:

Q. Do you have a son Charles?

A. Yes.

Q. He was brought home to you on January 1st, wasn't he?

A. Yes, in the night.

Q. By Detective Chism?

A. Yes.

Q. And Detective Chism talked with you at that time?

A. Yes, he was telling me that they had Robert and Richard for——

Mr. Vigil: It is immaterial what Detective Chism told her and I think it is improper to have this witness testify as to hearsay, and besides it is improper cross examination.

The Court: I will let the answer stand that they brought him home.

Q. They brought him home and they told you they had Robert. Is that right?

A. Yes.

Q. And they told you they had Robert and that they had Richard, didn't they?

Mr. Vigil: Your Honor, I object to this, that is hearsay, and I ask it be stricken and the jury instructed to disregard it.

(Argument of counsel.)

Mr. Rossman: Then I move to strike everything that this witness said she was told at Juvenile Hall and ask the jury be instructed to disregard it and strike it from the [fol. 340] record.

The Court: There was no motion made at the time of the testimony.

Mr. Rossman: Your Honor, I make the motion now.

The Court: Of course, she did testify to hearsay statements. I agree what the effect of her testimony was.

Mr. Vigil: If the Court please, there was no objection to the hearsay at the time she was saying this.

Mr. Rossman: The objection is timely.

The Court: I will strike the testimony and let you approach it in another way. You can establish it by rephrasing your question.

Mr. Vigil: I think it has already been established, but we will repeat it.

Redirect examination.

By Mr. Vigil:

Q. When did you go to the Juvenile Hall attempting to see your son?

A. The second of January, 1959.

Q. Were you permitted to see your son?

A. No.

Q. And did you see your son?

A. No.

Mr. Vigil: That is all.

Recross-examination.

By Mr. Rossman:

Q. On January 2d you went to see your son?

A. Yes.

[fol. 341] Q. You didn't go on January 5th?

A. No.

Q. You didn't go until January 8th, is that right?

A. Yes.

Q. And you were permitted to see him?

A. Yes.

Mr. Rossman: That is all.

The Court: Anything else?

Mr. Vigil: Nothing more.

(Witness excused and cautioned by the Court.)

ALLEN AOYAGI, called as a witness by defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Mr. Vigil: If the Court please, I would like to make a motion outside the presence of the jury at this time.

(Colloquy of Court and counsel at the Bench.)

Q. Will you state your name?
A. My name is Allen Aoyagi.
Q. How do you spell your last name?
A. A-o-y-a-g-i.
Q. Where do you live?
A. 1229—18th Street.
Q. What is your position there?
A. I am the manager.
Q. You are the manager?
[fol. 342] A. And owner.
Q. Can you state whether or not these rooms that you have in this place have running water?
A. No, sir.
Q. None of the rooms have water?
A. None of them.
Q. And you were acquainted with the deceased, Mr. Smith—Mr. Robert Smith?
A. Yes, I was.
Q. Did he have any water in his room?
A. There was no water in his room.
Q. How long had you known Mr. Smith?
A. About two years.
Q. Will you state whether or not Mr. Smith was deaf?
A. Deaf? No, sir.
Q. Could Mr. Smith hear?
A. He was hard of hearing, but I never heard he was deaf.
Q. Did you have to shout at him in order to get him to hear?
A. Yes.
Q. How long had this condition existed?
A. Ever since I know him.

Mr. Vigil: That is all.
Mr. Rossman: No questions.
The Court: Do not discuss your testimony with anyone.

(Witness excused.)

[fol. 343] KATHY DURBIN, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Cisneros:

The Court: How old is this witness, Mr. Cisneros?
Mr. Cisneros: I think she is thirteen.
The Court: How old are you?
The Witness: Tweleve, going on thirteen.
The Court: Mr. Cisneros, you will have to qualify the witness.

Q. What is your name?
A. Kathy Durbin.
Q. How old are you, Kathy?
A. Twelve.
Q. Kathy, do you know what the nature of an oath is?
A. A what?
Q. Do you know what it is to tell the truth?
A. Yes, sir.
Q. Do you know what it is to tell a lie?
A. Yes, sir.
Q. When you swear to tell the truth, do you know what that means?
A. Yes, sir.

The Court: I feel she knows the nature of an oath and you may go ahead.

Q. What is your address, Kathy?
A. 3240 Alcott.
[fol. 344] Q. On December 20, 1958, what was your address on that date?
A. 4560 Mariposa Way.
Q. Do you know Robert Gallegos?

A. Yes.

Q. How long have you known him?

A. A year and a half.

Q. Calling your attention, Kathy, to December 20, 1958, do you know what day of the week that was?

A. That was Saturday.

Q. It was on a Saturday?

A. Yes.

Q. How do you remember that date?

A. Because I was going to go to the Mayor's party with them, but I wasn't ready when they came after me, so they went over to their sister's after the other kids.

Q. You said you were going to the Mayor's party that morning?

A. Yes.

Q. But you didn't go?

A. No.

Q. Now, do you know Mr. and Mrs. Martinez?

A. Yes.

Q. Now, were they neighbors of yours on December 20, 1958?

A. Yes.

Q. How close did they live to your house, Kathy?

A. Right next door.

Q. Did you have occasion to go to the Martinez residence [fol. 345] on December 20, 1958?

A. Yes.

Q. Would you tell the jury and the Court what time you went to their house?

A. It was about five thirty.

Q. About five thirty?

A. Or a little before five thirty.

Q. Do you have occasion to visit the Martinez often?

A. Yes.

Q. Now, on this December 20th how long did you stay in the Martinez residence?

A. Till ten thirty.

Q. Till ten thirty, do you mean at night?

A. Yes.

Q. What were you doing on this night in question, Kathy, at the Martinez residence?

A. We watched Dick Clark on TV and after it was over,

we were upstairs and the boys were playing the guitar and we were teasing them.

Q. Did you see Robert Gallegos on that night?

A. Yes.

Q. Where was Robert at this time, Kathy?

A. Well, while Dick Clark was on, they were sitting on the couch.

Q. They were sitting on the couch, and where was he after Dick Clark was off?

A. He was upstairs playing the guitar.

Q. What time does Dick Clark come on?

A. At eight thirty.

[fol. 346] Q. Was that in the evening?

A. No, at night.

Q. Did you ever see Robert Gallegos leave the house that night?

A. No.

Q. Now, Kathy, after the Dick Clark show was—let me ask you this—strike that question. What time was the Dick Clark show over?

A. At nine o'clock.

Q. Did you see Robert Gallegos after nine o'clock?

A. Yes. He was upstairs playing the guitar.

Q. Did you see Robert Gallegos leave the house that night?

A. No.

Q. Now, let me ask you this question. What time did you go to the Martinez residence?

A. Five thirty or a little before.

Q. When was the first time you saw Robert, what time?

A. Well, they were over there when I went there, even before I went over there.

Q. You say they were there when you went over there?

A. Yes.

Mr. Cisneros: That is all.

Cross-examination.

By Mr. Rossman:

Q. You were supposed to go to a party on December 20th. Is that right?

A. Yes.

Q. What kind of a party was that?

A. The Mayor's party.

[fol. 347] Q. And where was that supposed to be held?

A. Well, I don't know.

Q. Where were you going?

A. To the Mayor's party, but I don't know where it was held but they knew and I was going with them, with Mrs. Martinez and their cousin.

Q. Why didn't you go?

A. Because when they came after me I wasn't ready, so they went on down to their sister's so I didn't go.

Q. They went on without you?

A. Yes.

Q. When did they get back?

A. I don't know what time they got back.

Q. What time were you supposed to go?

A. It was ten or ten thirty, somewheres around there, when they came after me.

Q. They came after you?

A. Yes, but I wasn't ready.

Q. That was in the morning?

A. Yes.

Q. What did you do all the rest of the day?

A. Played with the kids.

Q. Where?

A. In the project, in back of our house.

Q. You played all that day with the kids?

A. Till they came—Mrs. Martinez came back and then I went over to their house.

Q. You were playing with the rest of the kids until the Martinez came back. Is that right?

[fol. 348] A. Yes.

Q. And then when the Martinez came home what did you do?

A. I went over to their house.

Q. Who all was there?

A. Their whole family was there, their sister——

Q. Whose sister?

A. Eddie and Marian, Beverly, Ronnie, Donnie, the little one, Rusty, and the sister Annette.

Q. Eddie Martinez was there?

A. Yes.

Q. He wasn't shining shoes then?
A. No.
Q. And Robert Gallegos was there?
A. They came in about a half hour later.
Q. A half hour later than what.
A. Than when Mr. and Mrs. Martinez came in.
Q. And what time would that be?
A. It was about four.
Q. And who came in a half hour later?
A. Bobby and his little brother Richard.
Q. Bobby and Richard came in?
A. Yes.
Q. And Eddie was already there?
A. Yes.
Q. Did they bring their shoe shine kits with them?
A. I am not sure, I can't remember.
Q. Are you sure this was the same day of the Mayor's party?
A. Yes.
[fol. 349] Q. When did you first learn that Bobby and Eddie and Richard had been picked up by the police?
A. I was at their house the day they came after Eddie.
Q. You were there when they came to arrest Eddie. Is that right?
A. Yes.
Q. When did you first learn that the reason that they picked up Eddie was for something that happened on December 20th?
A. It was about a week later.
Q. And how did you happen to learn that?
A. Well, I read it in the papers and they told me.
Q. You read it in the papers and they told you. That would be somewhere around January 7th or 8th that you learned about this. Is that right?
A. I can't remember that.
Q. Did you tell anybody at that time that it couldn't have been them because you were with them all that time that evening?
A. Well, Mrs. Martinez, but she was there too.
Q. But you didn't tell anybody——
A. Well, her.
Q. Her?

A. Yes.

Q. Did you tell your own parents?

A. Yes.

Q. Did your parents take you to the police department, or Juvenile Bureau, to tell anyone?

A. No.

[fol. 350] Q. Are you sure this was the same Saturday that you were supposed to go to the Mayor's party in the morning?

A. Yes.

Q. Could it have been some other day?

A. No, because it was that day, because I remember they came home and we watched Dick Clark.

Q. And you never told anyone that despite the fact you knew they were charged with murder?

A. No.

Q. And you never told anybody?

A. Not until they told me, Mrs. Martinez.

Q. What did she tell you?

A. She let my Mom know and I was in the house, and she just told my Mom.

Q. What did she tell your Mom?

A. Well, I can't remember.

Q. You can't remember that?

A. It was some time ago.

Q. Was it shortly after Eddie was arrested?

A. I don't know.

Q. How is it you don't remember this and you remember everything that happened on December 20th?

A. Well,——

Mr. Vigil: If the Court please, I object to this, this is argumentative.

The Court: Objective overruled.

Q. How come you don't remember these things and you remember December 20th so well?

A. Well, the other I wasn't interested in too much.

[fol. 351] Q. You weren't interested in the fact your friends, Eddie and Bobby, were arrested for murder?

A. Not too much.

Q. And you could give some information that would prove they were at a certain place at a certain time?

Mr. Vigil: She is giving information.

Q. You just weren't too interested. Is that right?
A. Yes.
Q. When did you become interested?
A. Well, when it all started suddenly.
Q. What started suddenly?
A. It got worser and worser.
Q. When things got worse you became interested?
A. Yes.

Mr. Rossman: That is all.

Mr. Cisneros: Kathy, don't discuss your testimony with anyone else, don't tell anyone what was said in here.

(Witness excused.)

VIOLET DURBIN, called as a witness for defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Cisneros:

Q. I will have to ask you to speak up so I can hear you, and the members of the jury and the district attorney can year you.

Would you state your name?

[fol. 352] A. Violet Durbin.

Q. Where do you live, Mrs. Durbin?
A. 3240 Alcott.
Q. Calling your attention to December 20, 1958, where did you live at that time?
A. 4560 Mariposa Way.
Q. And are you acquapinted with Mr. and Mrs. Martinez?
A. Yes.
Q. Where did they live on December 20, 1958?
A. Right next door to us.
Q. Right next door to you. How long have you known Mr. and Mrs. Martinez?
A. About two and a half years.
Q. Do you know Robert Gallegos?
A. Yes.

Q. Calling your attention to December 20, 1958, Mrs. Durbin, did you have occasion to see Robert Gallegos on that date?

A Yes, I did.

Q. Where did you see him?

A. In front of my house; he was walking across in front of the house.

Q. In front of your house?

A. Yes.

Q. What time of the day was this?

A. It was about five thirty in the evening.

Q. How do you remember this date?

A. Well, because my children wanted to go to the Mayor's party with Mrs. Martinez and then they went [fol. 353] down to her sister's, I believe it was, and took all their children with them, so mine didn't go to the Mayor's party.

Q. Did you see anybody else with Robert Gallegos on that date?

A. Yes, his little brother, Richard.

Q. His little brother, Richard?

A. Yes.

Q. And what were they doing when you saw them?

A. Well, I seen them walk in front of my house and I thought it was my son and another boy and I opened the door to see if it was them and they went into Mr. Martinez house.

Q. Are you sure it was Robert?

A. Yes.

Q. How long have you known Robert Gallegos?

A. Well, I have seen him at the Martinez and he come to my house a few times.

Q. Did you see Robert about five thirty on the 20th of December, 1958?

A. When I went to get my daughter from their house, I seen them there.

Q. What time was that?

A. It was about ten o'clock.

Q. And Robert Gallegos was there at that time?

A. Yes.

Mr. Cisneros: That is all.

Cross-examination.

By Mr. Rossman:

Q. Are you related to the Martinez family?
[fol. 354] A. No, I am not.
Q. Now, you remember the Mayor's party transaction. Do you remember the date of the Mayor's party?
A. Yes.
Q. And was that December 20th?
A. Yes.
Q. And that was the same day that you saw Robert and Richard Gallegos?
A. Yes.
Q. How do you know it was the same day?
A. Well, Mrs. Martinez had come home and she had all her kids with her.
Q. Doesn't Mrs. Martinez do that on many occasions?
A. Well, sure.
Q. How do you remember this being the same day that you saw Robert and Richard Gallegos?
A. I just know it is because they were there watching the Dick Clark program.
Q. Didn't they do that regularly?
A. No.
Q. Is this the only time Kathy went there for this program?
A. No, Kathy would go over there every Saturday. I didn't turn the program on, I didn't care for it.
Q. So there was nothing unusual about her going to see the Dick Clark program?
A. No.
Q. Nothing unusual about Kathy being there on Saturday evening?
[fol. 355] A. No.
Q. Nothing unusual about the Martinez being home on Saturday evening?
A. No.
Q. Nothing unusual about Robert Gallegos and his brother Richard being there every Saturday?
A. No.
Q. How do you know this was the same day of the Mayor's party?

A. I just do because I didn't see him there the next weekend and they were all talking about the party—all the kids were.

Q. Getting to this other fact, Mrs. Durbin, when did you first learn that Robert and Eddie and Richard had been picked up and placed in Juvenile Hall?

A. It was the day they come to get Eddie. I didn't know whether Robert had been picked up or not.

Q. You learned about it sometime, didn't you?

A. Yes, afterwards.

Q. When did you learn that?

A. I don't remember. I know it was in January sometime.

Q. You knew it, and you knew also from talking to Mrs. Martinez and reading the newspaper what they were charged with, didn't you?

A. Yes.

Q. And you knew the date on which this was supposed to have occurred. Is that right?

A. Yes.

Q. Did you ever make any attempt to tell anyone you [fol. 356] *you* had seen these boys on that date?

A. No.

Q. Why not?

A. Mrs. Martinez asked me if I would testify if they needed me.

Q. When did she ask you to testify?

A. Right before I left.

Q. When was that?

A. In February.

Q. But you made no attempt, knowing these boys were held on a charge of murder, to inform the authorities that you had seen these boys at a particular place when they were supposed to have committed a crime?

A. No.

Q. Did you consider that this information might be vital?

A. No, I didn't.

Q. You didn't. Why didn't you, Mrs. Durbin?

A. Well, I don't know. I just didn't know whether I should have said anything about it or not.

to testify, is that right?

A. Yes.

Q. And it was at that time you refreshed your memory as to this transaction?

A. No, I didn't.

Q. You mean you knew that all along?

A. I knew the case would come up.

Q. Are you positive about that?

A. Yes, I am.

[fol. 357] Q. Or are you trying to do the Martinez family a favor?

A. No, I am not.

Q. You didn't go to the Police Department with that information?

A. No.

Q. You didn't go to Juvenile Hall with that information?

A. No.

Q. And you knew they were charged in the District Court with murder, didn't you?

A. Yes, I did.

Q. And you didn't attempt to give the District Attorney this information?

A. No.

Q. And you knew these boys were charged there with murder?

A. Yes.

Q. Or you didn't have any discussions with Mrs. Martinez about this?

A. I didn't talk to her too much about it.

Q. You didn't even attempt to talk to her too much about it?

A. No, I didn't.

Mr. Rossman: That is all.

Mr. Cisneros: No further questions.

(Witness excused and cautioned by the Court.)

[fol. 358] JAKE GUTTEREZ, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct Examination.

By Mr. Cisneros:

Q. What is your name?
A. Jake Gutterez.
Q. How old are you, Jake?
A. Fourteen.
Q. Do you know what an oath is?
A. To tell the truth.
Q. Do you know what it is to tell the truth?
A. Yes.
Q. Do you know what it is to tell a lie?
A. Yes.

The Court: You understand when you take this oath you are promising to tell the truth, do you understand that?
The Witness: Yes, sir.

Q. What is your address?
A. 4501 Lipan.
Q. How long have you lived at that address?
A. Going on five years.
Q. Do you know Mr. and Mrs. Martinez?
A. I have known them for about three years now.
Q. Do you know where they live?
A. 4158 Mariposa Way.
Q. Have you ever been to their house?
A. I go all the time there.
Q. Do you know Robert Gallegos?
[fol. 359] A. I have known him for about three weeks, him and Vickie.

Q. Vickie. I call your attention to December 20, 1958. Did you have occasion that day to go to the Martinez residence?
A. No—will you say that again?
Q. Calling your attention to December 20, 1958, did you have occasion to go to Mr. and Mrs. Martinez residence?
A. By "occasion", what do you mean by that?

The Court: He doesn't understand the wording of your question. Just ask him if he was over there.

Q. Did you go to the Martinez house?
A. On December 20th?
Q. Yes.
A. Yes.
Q. What day of the week was this?
A. It was the Mayor's party, on a Saturday.
Q. What time did you go to the Martinez house?
A. Seven o'clock.
Q. Seven o'clock?
A. Yes, after I got off work.
Q. Did you work on that day?
A. Yes, sir.
Q. Did you go to the Mayor's party?
A. No, I couldn't I was working.
Q. But you remember the date when the Mayor's party was held?
A. Yes.
Q. What did you do after you got over to the Martinez house?
[fol. 360] A. I knocked at the door and asked for Eddie to see if he was home. So I went in. I talked to him a while and then we watched television.
Q. Do you remember what television show you watched?
A. It was the Dick Clark show.
Q. What time does that show come on?
A. Eight thirty.
Q. Did you se Eddie Martinez on that day?
A. Yes, sir.
Q. Did you see Bobby Gallegos?
A. I didn't see him, but they was upstairs playing the guitar.
Q. Did you see Richard Gallegos?
A. I didn't see him.
Q. But there was some upstairs?
A. Yeah.

Mr. Cisneros: That is all, your Honor.

Cross-examination.

By Mr. Rossman:

Q. When did you first learn that the Mayor has a party on December 20th?

A. I have known it—we went to the first one. That was when I wasn't working. It was on a Saturday, it was last year after December 20th.

Q. After December 20th?

A. Yes, they have them every year.

Q. This year, however, you were working?

A. Yes.

Q. Did you know there was a party that day, or did you [fol. 361] learn about it later?

A. Yes, I knew there was a party because that day they asked if we wanted to get off, but I didn't want to.

Q. Where do you work?

A. I use- to work at another place. Now I work for Rocky Mountain Egg Company.

Q. And when you got off work you went to Martinez home. Is that right?

A. Yes, sir.

Q. Did you know Robert Gallegos at that time?

A. Yes, sir.

Q. You did know him?

A. Yes.

Q. Did you know his brother, Richard?

A. Yes, I knew him.

Q. How long have you known these boys?

A. About three weeks.

Q. You didn't see them there that night, did you?

A. I saw the little one.

Q. You didn't see Robert?

A. No, I didn't see him.

Q. Did you see Eddie?

A. Yes, I saw Eddie.

Q. Was Robert downstairs when the program was on?

A. No, the kids said he was upstairs playing the guitar.

Q. What other television show did you watch that night?

A. Gunsmoke.

Q. What other television show did you watch?

A. I can't remember.

[fol. 362] Q. Do you watch those programs every week?
A. Yes.
Q. Do you like those programs?
A. Yes, sir.
Q. How do you know Dick Clark was on that night?
A. Dick Clark?
Q. Yes, who talked about it?
A. (Pause)
Q. How do you know it was on this Saturday?
A. It comes on on Saturday.
Q. So it could have been any Saturday?
A. No, sir.
Q. Was this the only Saturday you were at Martinez?
A. It was on that night.
Q. How do you know that?
A. I remember it.
Q. How do you know it was that Saturday?
A. Because I was there with Eddie.
Q. How do you know it was the same Saturday night?
A. Because it was the Mayor's party, that night.
Q. Who reminded you it was the Mayor's party that day?
A. The boss did.
Q. Was that the first time that you knew it was the Mayor's party when the boss told you?
A. No.
Q. When did you first know about it?
A. When we moved in there.
Q. When you moved in there. Do you know Eddie very well?
A. I have known him for about three years.
[fol 363] Q. You knew he was arrested on the charge of murder, did you not?
A. No, sir.
Q. You never knew this?
A. After I came home from work the next day I knew.
Q. December 21st?
A. I don't know what date it was, but one night I came there was a patrolman there—a policeman, I think.
Q. How many days was this after the Mayor's party?
A. I don't remember.
Q. A day or two?

A. I don't know, it was quite awhile after.
Q. You knew he was arrested for something, didn't you?
A. Yes, sir.
Q. Did you read about it in the newspapers?
A. Yes.
Q. Did you know it was supposed to have happened on December 20th?
A. Yes.
Q. Did you tell anyone that you knew where he was on December 20th?
A. I told the father of Eddie.
Q. Did you tell the police officers?
A. No.
Q. Do you know where the police building is?
A. Yes.
Q. It is not too far from where you live, is it?
A. We lived over here on Jason then.
Q. It was too far for you to go there?
[fol. 364] A. I don't have no way of getting down there.
Q. Whom did you first tell about it?
A. Mr. Martinez.
Q. And when did you first tell him about it?
A. After I had found out.
Q. When was that?
A. I wouldn't remember.
Q. But you do remember December 20th?
A. Yes.
Q. You do remember the Mayor's party?
A. Yes, sir.
Q. And you do remember the Dick Clark and Gunsmoke shows?
A. Yes, sir.
Q. You remember everything about December 20th?
A. Yes, sir.
Q. Did you ever attempt to tell anybody you were with Eddie the night he was supposed to have committed this crime?
A. That is impossible.
Q. But you were with Eddie on December 20th?
A. That was after seven. We stood at the house.
Q. How long did you stay there?
A. Till about ten.

Q. They were all there?
A. Yes, sir.
Q. And you never told anyone that?
A. I told Mr. Martinez.
Q. Did you ever tell any police officer that?
A. No.
Q. Did you ever tell anybody of authority of any kind?
[fol. 365] A. No.

Mr. Rossman: That is all.

(Witness excused and cautioned by the court.)

Cleto E. Martinez, called as a witness by defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Cisneros:

Q. Would you state your name, please?
A. Cleto E. Martinez.
Q. I will have to advise you to talk loudly so that the jury and everybody in the courtroom can hear you.
What is your address?
A. 4558 Mariposa Way.
Q. How long have you lived there?
A. Six years.
Q. Are you married, Mr. Martinez?
A. Yes.
Q. Do you have any children?
A. Yes.
Q. How many?
A. Eight.
Q. I call your attention to December 20, 1958, Mr. Martinez, would you tell the court and jury where you were on that afternoon?
A. What time?
Q. Well, starting around noon, Mr. Martinez?
[fol. 366] A. I was fixing my car.
Q. You were fixing your car?
A. Yes.

Q. What did you do afterwards?

A. About three thirty I went after my wife and the kids.

Q. And where did you go?

A. To my sister-in-law's, 2464 Stout.

Q. What did you do there, Mr. Martinez?

A. Well, she wasn't there when I got there and I asked my sister-in-law, "Where is my wife and the kids?" And she said——

Q. Don't repeat anything anyone told you, Mr. Martinez, that is hearsay.

A. My wife wasn't there.

Q. So, what did you do then?

A. Well, I asked, "Where did she go?" And she said——

The Court: Just tell us what you did, not what anyone said.

The Witness: I went after her down at my aunt's, 2654 Stout, and she had just left, and then I left too. And when I was getting to my sister-in-law's they were just getting there and I told her, "Get the kids so we can go right away home."

Q. Where was this at, Mr. Martinez?

A. 2654 Stout.

Q. And what time was it?

A. Oh, about four o'clock.

Q. And what did you do right after that?

A. We went home. I picked up all the kids except one, [fol. 367] and that was Marion, I couldn't find him, so I took them home and come back after him about a half hour later. He still wasn't there. Then I went down to my aunt's and stayed there awhile and then I went back home and he wasn't home and then I told my wife—this was about five thirty—and he was there then.

Q. He was where?

A. 2654 Stout. So then I picked him up and went down to my aunt's, stayed there awhile talking and then we went home and when I got home about six thirty or seven Bobby and Richard were there. They were there when I got home.

Q. Do you know what time Bobby and Richard got over to your home?

A. I wasn't there.

Q. Now, the first time when you picked up the kids, was Eddie Martinez with you?

A. Yes.

Q. Did you go any place that night?

A. No.

Q. Well, what did you do that night, Mr. Martinez?

A. Oh, we laid around on the sofa with Eddie and watched TV and Bobby was telling me about we had two TV's. I had one on top of the other. That one we got just was a picture and the man he told me we have a TV that we will leave for you and he plugged it in and it didn't work, just had a voice, and he said, "This thing was working before." I told him, "What am I going to do, we want to watch TV."

Q. Did you have two TV sets that night?

[fol. 368] A. Yes.

Q. And you had it because one set wasn't working, is that right?

A. Well, the one they brought me didn't work, so he said he had another in the car that had a picture on it but no voice. It was a table model, so he put it on top of the other TV, so we had two of them.

Q. One with a voice and one with a picture?

A. Yes, that is how it was. The kids they wanted to watch TV.

Q. Now, was this on December 20th?

A. Yes, sir.

Q. How do you know that it was December 20th?

A. Because I took them to the Mayor's party that morning at nine o'clock got to my sister-in-law's at nine o'clock and then I went——

Q. Did you go to the Mayor's party?

A. No, I didn't. I took them to the party.

Q. Did you see Robert Gallegos that night?

A. That night?

Q. Yes, of December 20th?

A. Yes.

Q. Where was he?

A. He was in the house there.

Q. Do you know whether Bobby Gallegos went upstairs?

A. I got my kids a guitar and they broke a string and

I got mad at Marion for that and I told him, "Somebody busted a guitar string, you better get another string." So they went and got another string at the drug store.

[fol. 369] Q. How long have you known Robert Gallegos?

A. All his life.

Q. You are Eddie Martinez' father, is that right?

A. Yes.

Q. When did you first find out that Robert was charged with any crime?

A. That was January the second.

Q. And when did they pick Eddie up?

A. January 2d.

Q. Did you talk to any police officers at that time?

A. When they picked Eddie up, I did, I talked to two officers.

Q. Did they tell you why they were picking Eddie up?

A. They wanted to question him.

Q. What did you say to the officers?

A. I told them, "About what?" And he didn't tell me, just that, "We just want to talk to him." He put him in the car and I told him, "I want to go with him." And he told me he isn't coming back, so I didn't go.

Q. Did he tell you they wanted him for an offense that was committed on December 20th?

A. No.

Q. Did any police officers talk to you after that, Mr. Martinez?

A. I called them up. I used to call him up because I was worried about my boy, what they had him in for, and all that. They didn't want to give me the date or anything.

Q. Were you permitted to see Eddie after he was picked up?

A. I called up and they told me he was under investiga-

[fol. 370] tion, they were interrogating him, they said.

Q. Did you tell them you wanted to see him?

A. He said I couldn't see him, that was all.

Q. Who told you that?

A. I don't know who it was, they just answered the 'phone.

Q. When did you see Eddie next?

A. Oh, about the 14th.

Q. About the 14th of January?
A. Yes.

Mr. Cisneros: That is all, your Honor.

Cross-examination.

By Mr. Rossman:

Q. When did you first learn, Mr. Martinez, that your son was charged with a crime?
A. Well, I didn't learn he was charged with it.
Q. Sometime you learned, didn't you, that he was charged with a crime?
A. No, I went down to my sister-in-law's and Eddie was with me——

Mr. Vigil: I think, if the Court please, this witness did not understand the question.
Mr. Rossman: I will rephrase it.

Q. When did you first learn Eddie was charged with a crime?
A. January 2d.
Q. At that time they did not tell you what the crime was, did they?
A. No.
[fol. 371] Q. They didn't tell you anything except that he was wanted for investigation?
A. Yes, they were going to question him.
Q. Sometime later you learned he was formally charged. Is that correct?
A. No.
Q. You didn't learn he was charged?
A. No, I didn't learn he was charged.
Q. You knew he was charged with murder, did you not?
A. With murder?
Q. Yes.
A. He wasn't charged with murder, was he?
Q. You have been in court these last two weeks, haven't you?
A. Yes.
Q. You know your son was charged with the crime of murder, don't you? When did you first learn this fact?

A. That he was charged with murder?

Q. Yes.

A. When they brought him from Golden at the State Industrial School?

Q. Yes. When was that?

A. That was about—I don't know when it was, really say what date.

Q. You don't remember when that was?

A. No, I don't. I don't remember what date it was.

Q. Before that time you knew he was being held, did you not?

A. That he was being held in Golden.

[fol. 372] MOTION FOR A MISTRIAL AND DENIAL THEREOF

Mr. Vigil: If the Court please, at this time we would have to object to this further questioning. Furthermore, I think it is grounds for a mistrial because the District Attorney is pursuing something in questioning about this matter of another possible offense, which we know this boy has not been charged with. I think bringing it out is error. He was sent to Golden by the Juvenile Court on this same offense and they are, of course, bringing it out as a different offense and we must ask the Court to declare a mistrial.

The Court: The witness brought it out.

Mr. Vigil: The District Attorney, if the Court please, has continued to pursue it.

Mr. Rossman: Your Honor, this is a matter which I intend to pursue at some length.

The Court: Do you mean the matter of when he first knew of this charge?

Mr. Rossman: No, in questioning this witness.

The Court: I see no grounds for a mistrial. That motion is denied.

Mr. Vigil: Note our exceptions to the Court's ruling.

Mr. Rossman: Will the Court recess at this point instead of a few minutes from now?

The Court: It is almost lunch time. The jury will go with the bailiff, please.

(Thereupon, a recess was taken to 2:00 p.m.)

[fol. 373] Afternoon Session 2:00 p.m.

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

Mr. Vigil: May it please the Court, in this matter, during the questioning by the District Attorney, he asked a question that reflected on matters as to whether or not Eddie Martinez had been previously convicted or investigated concerning this present matter and we stated at that time we were asking for a mistrial.

For the sake of the record we object to the line of questioning. Eddie Martinez is no longer in this case, having been dismissed as a defendant by the Court, and, therefore, any reference to Eddie Martinez or any implication he is still in the case is prejudicial and we ask for a mistrial.

Mr. Rossman: My understanding is of the questioning on the direct examination referred to Eddie Martinez throughout the entire examination. My questions were not directed to the witness concerning any former conviction. I merely asked the witness when he first learned of certain things and he volunteered certain things concerning another conviction.

The Court: The motion for a mistrial is denied for the reason, of course, the former defendant has already been discharged by the Court, and the Court feels the jury could in no way be influenced by that examination.

Mr. Vigil: Note our exceptions to the ruling of the Court.

[fol. 374] Mr. Vigil: I want the record to reflect that this same objection is made to the questioning by the District Attorney of the witness Jake Guitterez.

The Court: The same ruling.

Mr. Vigil: Note our exception to the ruling of the Court.

IN THE PRESENCE OF THE JURY

CLETO E. MARTINEZ, resumed the stand for further

Cross-examintion.

By Mr. Rossman:

The Court: You understand you are still under oath?
The Witness: Yes, sir.

Q. Mr. Martinez, when did you first learn that your son and Robert Gallegos were accused of committing a crime?

Mr. Vigil: If the Court please, we previously objected to the inclusion of his son, Eddie Martinez, for the reason the Court has previously dismissed Eddie Martinez from this charge. We asked the questions be confined to Robert Gallegos. I think it is improper for the District Attorney to go into that phase of this case. I think it is probably proper at this time that the Court return a verdict of not guilty.

The Court: That will be taken care of at the proper time. Objection overruled.
Mr. Vigil: Note our exception.

Q. Will you answer the question, please?
[fol. 375] A. Well, I didn't hear about it until I read in the paper he was charged.
Q. When was this?
A. In January.
Q. At that time you read he was charged with having committed the crime of robbery on December 20th. Is that right?
A. Yes.
Q. When did you first find out that December 20, 1958, was the date on which this crime was supposed to have occurred?
A. When I was in the hospital.
Q. When was that?
A. Oh, it was about the 12th.
Q. The 12th of January?
A. Yes.
Q. When did you get out of the hospital?

A. The 14th.

Q. And you say you saw Eddie at that time, is that right?

A. The 14th.

Q. At that time you remembered Eddie was at home with you on December 20th on the day of the Mayor's party?

A. He was home.

Q. And you remembered that when you saw him on the 14th?

A. I went to see him at Juvenile Hall.

Q. But you knew at that time that he had been home with you on December 20th?

A. He was home.

Q. You knew it at that time, didn't you?

[fol. 376] A. That he was home with me?

Q. Yes, on December 20th?

A. Yes, at night he was home there.

Q. And when you went to see him at Juvenile Hall you remembered that fact, didn't you, that he had been home with you on the night of December 20th?

A. At that time I didn't know it, I don't think.

Q. At that time you didn't know it? You mean on January 14th you didn't know he was home with you on December 20th?

A. I didn't talk to him because I was under a Doctor's care.

Q. When did you first talk about December 20th with anyone?

A. With the Doctor.

Q. When?

A. About the 12th. I knew it from him.

Q. From whom?

A. The Doctor.

Q. You knew this happened on the 20th, did you not?

A. Yes.

Q. Then you remembered back to December 20th at the time the Doctor talked to you and remembered that Eddie and Robert were home with you on that date?

A. They were home.

Q. Did you remember that on the 12th of January?

A. They didn't want to tell us what date it was.

Q. But you learned about it, didn't you?

A. I learned from the Doctor.

[fol. 377] Q. When you learned about that fact, why didn't you tell the police officer that Eddie and Robert had been home on that date, December 20th?

A. I didn't go to court that day.

Q. Why didn't you tell them?

A. I think I did tell them.

Q. Who did you tell?

A. Riley and King.

Q. You think you told them?

A. I did, through the 'phone. That was when I was in the hospital.

Q. When was it you told them?

A. I was in the hospital that day and I telephoned up there.

Q. January 12th?

A. Yes, about that.

Q. Who did you talk to?

A. Riley or King.

Q. Is that Louis King?

A. I don't know, I just know him by "King."

Q. The King who is connected with the Juvenile Bureau, the police officer?

A. Yes, he is.

Q. That is the one you talked to?

A. Yes.

Q. And that is the one you told that Eddie and Robert Gallegos was home with you. Is that right?

A. I told him Eddie was not there the 20th.

Q. What did you tell him specifically?

[fol. 378] A. I just told him Eddie wasn't there, that he was home.

Q. You told him that on the telephone?

A. Yes.

Q. Did you identify yourself to him?

A. Yes.

Q. Did you tell him you were Eddie's father?

A. Yes.

Q. Did he come out to see you?

A. No.

Q. Did he ask you to come see him?

A. No.

Q. Did you tell anyone else about this?

A. The Doctor.

Q. Who is the doctor?
A. Dr. Wolcott.
Q. Where is he located?
A. Denver General.
Q. And when did you tell him——

Mr. Vigil: Now, if the Court please, I think this whole line of questioning is certainly immaterial. What he told the Doctor would not help to prove any element in this case and I ask the questions be stricken and any further questioning along this line be stopped because it is improper.

The Court: The objection is overruled.

Mr. Vigil: Note our exception to the Court's ruling.

Q. When did you tell him that?
A. Oh, about that time in January. I don't know the date when I told him.
Q. You were in the hospital then, is that right?
[fol. 379] A. Yes.
Q. What dates were you in the hospital?
A. I was there, I think, from the 7th to the 14th.
Q. So it was somewhere between the 7th and 14th that you talked to him. Is that right?
A. I talked to him a lot of times.
Q. But during that period of time did you talk to him about Eddie being home on the 20th of December, say between the 7th and 14th?
A. Maybe it was about the 12th.
Q. Would the same apply to your conversation with Detective King?
A. I talked to the Doctor first.
Q. And it was somewhere during that period of time you talked to Detective King?
A. I called him up the 12th.
Q. You called him up the 12th, is that right?
A. Yes.
Q. Was your wife home on December 20th with you?
A. Yes.
Q. All evening?
A. Well, when I went out I wasn't with her.
Q. I am talking about after you came back about six thirty.

A. Yes.

Q. You were home the rest of the evening watching the two TV's?

A. I watched, then I went to eat and then I sat around.

Q. Did you eat with the rest of the children there?

[fol. 380] A. Yes.

Q. Did Eddie eat and Robert Gallegos eat there?

A. Yes.

Q. Did your wife prepare that meal?

A. Yes.

Q. Was she there with you during that whole evening?

A. Yes.

Q. Now, Mr. Martinez, have you ever been convicted of a felony?

A. Yes, sir.

Q. When and where?

Mr. Vigil: Now, if it please the Court, the answer has been given. It is necessary to develop it any further.

Mr. Rossman: I have a right to ask the nature of the case. I am prepared to argue the point.

The Court: I think they can ask the nature of it, because that is material.

Mr. Vigil: We object to the Court's ruling and note our exception.

Q. What was the offense you were convicted of?

A. Robbery.

Q. Aggravated robbery, is that correct?

A. Yes, sir.

Mr. Rossman: That is all.

Mr. Cisneros: Nothing further from this witness, your Honor.

(Witness excused.)

[fol. 381] LILLIAN MARTINEZ, called as a witness by defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Cisneros:

Q. I will have to caution you to speak out loudly, Mrs. Martinez, so all the members of the jury can hear you.

A. Yes.

Q. Will you state your name, please?

A. Lillian Martinez.

Q. Where do you live, Mrs. Martinez?

A. 4558 Mariposa Way.

Q. How long have you lived at that address?

A. We lived there, it will be six years in August.

Q. Were you living at that address on December 20, 1958?

A. Yes.

Q. Calling your attention to the evening of December 20th, Mrs. Martinez, were you at home on that evening?

A. Yes.

Q. What time did you get home?

A. We got home about around four thirty.

Q. Do you know Robert Gallegos?

A. Yes.

Q. Did you see him on that evening in question, Mrs. Martinez?

A. Yes.

Q. What time did you see him?

[fol. 382] A. He got there about—it was about five thirty, between five thirty and six.

Q. And how long was Robert there that night?

A. He slept there that night, he stayed there and slept there that night.

Mr. Cisneros: That is all, your Honor.

Cross-examination.

By Mr. Rossman:

Q. Mrs. Martinez, when did you first learn that Robert was charged with a crime alleged to have occurred on December 20, 1958?

A. When did I hear about it?

Q. When did you first learn about it, yes?

A. I remember reading it in the Post.

Q. When?

A. That was sometime in February.

Q. In February. You knew about the date of December 20th long before February, didn't you?

A. I remember reading it in the paper.

Q. Now, you knew about this date long before February that this was supposed to have occurred on December 20, 1958, did you not?

A. Yes, I guess I did.

Q. When did you first learn about it as having been December 20, 1958?

A. I don't understand, I mean do you mean when I heard about the murder charges, or what?

Q. No. You knew your son and Robert Gallegos were [fol. 383] accused of a crime, weren't you aware of that?

A. Yes, I know when they went to pick my boy up.

Q. When did they pick your boy up?

A. The second of January.

Q. The second of January. Where did they pick him up?

A. At my place.

Q. Did they have any conversation with you at that time as to why they were picking him up?

A. No.

Q. When did you learn why he had been picked up?

A. They had been there that morning to pick him up but he wasn't at home at the time, and then they told me when he got back to let them know when he was home, so I did.

Q. Yes?

A. And then they came back and picked him up.

Q. When did you learn specifically what he was being held for?

A. I believe it was—I called up sometime that afternoon.

Q. That would be January 2d, right?
A. Yes.
Q. Did they tell you what he was being held for?
A. No.
Q. When did you first learn what he was being held for?
A. When I called, when I wanted to visit him.
Q. When was this?
A. That was January 6th, on a Monday.
Q. January 6th? Look at the calendar behind you, Mrs. Martinez.
A. Yes.
[fol. 384] Q. Do you mean January 5th, which is a Monday as shown by the calendar?
A. Yes.
Q. Did you learn as to what he was being held for at that time?
A. No, they just told me when I called, I asked if I could go visit him; at the time they said no because they were questioning him.
Q. When did you learn what he was being held for?
A. It was on a Wednesday when my husband called up.
Q. The Wednesday after January 5th?
A. Yes.
Q. Then you knew what he was being held for and what he was being charged with, is that right?
A. Yes.
Q. But you knew what he was charged with was for something that occurred on December 20th, is that right?
A. No—I believe so.
Q. And you knew this on January 7th, which was Wednesday?
A. I guess so.
Q. And at that time, on January 7th, you knew he had been home with you on December 20th, didn't you?
A. Yes.
Q. Did you tell anybody that he was home with you on December 20th?
A. No.
Q. Why didn't you?
A. Well, I told my husband about it.
Q. Did you tell any police officer?
[fol. 385] A. No.

Q. Did you tell anyone in the Juvenile Bureau?

Mr. Vigil: If the Court please, we again must object. We have previously objected about the Juvenile hearing.

Mr. Rossman: We are not talking about the Juvenile Court hearing, we are talking about the Juvenile Hall.

Q. Did you tell anyone from the Juvenile Bureau?

A. No, I didn't.

Q. Why didn't you?

A. Because when they talked at the hearing they never asked us no questions at all.

Q. But you knew this was supposed to have happened on the 20th of December, didn't you?

A. After that I found out about that.

Q. You just got through testifying that you knew it on January 7th?

A. Yes, I did.

Q. And you didn't tell a soul, did you, who was in authority?

A. I don't remember.

Q. Why didn't you, Mrs. Martinez? Is it because you thought it would sound better here in court today for the first time?

A. They never asked me.

Q. They never asked you. You knew your boy was being charged with a crime that occurred on December 20th, did you not?

A. I don't get it, you mean at Juvenile Hall when they took—when they was going to send the kids to Golden?

[fol. 386] Mr. Vigil: If the Court please, I think this is improper and we ask all this evidence be stricken. Certainly we are entitled to a mistrial on the basis of this testimony. These boys were sent to Juvenile Hall, and this is the same evidence and I think this should be stricken.

Mr. Rossman: I cannot help what she testified to.

The Court: The objection is overruled.

Mr. Vigil: Note our exception to the ruling of the Court.

Q. You heard all this evidence at that hearing, didn't you?

A. Yes.

Q. The same thing you are hearing here, isn't that

right, except for the fact Mr. Smith had not died. Isn't that right?

A. I didn't go in that room to hear what they were saying.

Q. You didn't go in there?

A. No. Mr. Hull, the probation officer, had Eddie with him and I went with Eddie that day and when they picked Eddie up to take him I didn't know what room that was.

Q. But you knew everything that they were talking about occurred on December 20th, didn't you?

A. Yes.

Q. And you say he was home on that date?

A. Yes, he was home.

Q. And you didn't tell anyone in authority over there that he was home?

[fol. 387] A. I didn't have a chance because at that time they never asked us anything, but I was going to.

Q. When were you going to tell them that?

A. When they took Eddie to Golden they never asked me anything. I was going to tell Mr. Hull. I was going with him to see what the proposition was about and he told me to stay down there and wait, that they was going to question them kids.

Q. And after Eddie was charged with murder, after Mr. Smith had died, did you tell anybody then that Eddie had been home with you on December 20th, as well as Robert Gallegos?

A. Possibly——

Q. Did you?

A. No.

Q. Why not, Mrs. Martinez? Your boy was charged with murder. Why didn't you tell someone?

Mr. Vigil: I think this is wholly immaterial and again we object. This should be stopped at this very point. All of this testimony is highly prejudicial. We have already made our objection to this line of questioning to what the Juvenile Court did and we know what the Juvenile Court did because they have already testified they sent them to Golden, and now the District Attorney is seeking to go all over this, "Why didn't you tell someone?"

The Court: The objection is overruled.

Mr. Vigil: Note our exception to the Court's ruling.

Q. Your boy was charged with murder, Mrs. Martinez, why didn't you tell anybody that he had been home with you that night?

[fol. 388] A. Just like I said, they never asked me.

Q. When you made your statement for the newspaper, did somebody ask you?

Mr. Vigil: If the Court please, I don't know that there is anything before this Court about making a statement for the newspaper——

The Court: The objection is sustained.

Q. When did you tell anybody this, Mrs. Martinez?

A. I don't remember.

Q. Did you tell your lawyers?

A. We seen our lawyers when they were sent to Golden.

Q. Did you tell them he had been home with you on December 20th?

A. Yes.

Q. You told your lawyers at the time of the sentencing to Golden?

A. That was that day, yes.

Q. Did you tell Mr. Cisneros?

A. I don't remember saying that.

Q. Did you tell Mr. Vigil?

A. I don't know if I did or not.

Q. What lawyers did you tell then?

A. Well, Mr. Cisneros.

Q. I just asked you if you told Mr. Cisneros?

A. I said yes if I went to see him.

Q. What did you tell Mr. Cisneros?

A. That I had told him about Eddie being home.

Q. When did you tell him that?

A. When I went to see him.

[fol. 389] Q. When you went to see who?

A. Mr. Cisneros.

Q. When was this?

A. I can't recall the date.

Q. Well, was it a week ago, ten days ago, approximately when?

A. I don't know, I can't recall that day.

Q. Approximately how long ago was it?

A. When the kids were in Golden.

Q. How long had they been there?

A. I can't remember how long they had been in there when we went to see him.

Q. Had they been there a week, a month, or what?

A. I guess they had been there about a week or so.

Q. You didn't see any police officer at any time did you?

A. No.

Q. And when murder charges were filed through the District Attorney's office, you made no attempt to tell the District Attorney or any of his assistants that your boy was home with you on the night of December 20th?

A. Just like I said, I didn't have a chance to say it.

Q. You didn't have a chance to say it?

A. No, they didn't give me a chance over there that day.

Q. I am talking about after this day. Did you make any attempt to tell anyone about this?

A. No.

Mr. Vigil: I should like the record to show that I didn't enter into this case until after this charge was filed. [fol. 390] Mr. Rossman: If he wants to testify, let him take the stand.

The Court: He cannot testify.

Mr. Rossman: Then let him keep quiet.

Redirect examination.

By Mr. Cisneros:

Q. Did anybody send you any notice of a hearing to be had in Juvenile Court?

A. No, they did not.

Q. How did you find out about it?

A. I had to call up myself to find that out.

Q. Isn't it correct that before the murder charges were filed that you talked to me about having another hearing?

A. Yes sir.

Q. Mrs. Martinez, you stated that you did not have any official notice about Juvenile Hall and Juvenile Court. Is that correct?

A. No, I had no notice.

Q. And had you ever had any experience along these lines as to what happens at a hearing in Juvenile Court?

A. No, I didn't.

Q. And nobody asked you any questions at that time?

A. No.

Q. Do you recall when this hearing was held?

A. That was January 16th.

Q. January 16th. And right after that, a few days after that, do you recall going to my office?

A. Yes.

[fol. 391] Q. That was before the murder charges were filed, is that correct?

A. Yes, sir.

Q. And when was the first time you talked to Mr. Vigil, was that before or after the murder charges were filed?

A. I believe that was after.

Q. That was after. And do you recall that you told me all that you have told here today when you went to see me?

A. Yes.

Q. And I told you——

Mr. Rossman: Your Honor, I object to the form of the question as being leading.

The Court: Sustained.

Mr. Cisneros: That is all, your Honor.

Recross-examination.

By Mr. Rossman:

Q. Mrs. Martinez, you did attend the hearing at the Juvenile Court?

A. Yes, I did.

Q. You heard everything that went on there with reference to the charge?

A. I understood a little of it.

Q. You understood it, didn't you?

A. A little bit of it.

Q. You understood he was charged with committing a robbery on December 20th?

A. Yes.

Q. You understood that clearly, did you not, that Robert Gallegos and your son were being charged with committing [fol. 392] robbery on December 20th and you said nothing?

A. They didn't give us a chance.

Mr. Vigil: We object to this line of questioning and ask all answers elicited from this witness be stricken and that the jury be instructed to disregard this evidence. We feel it is wholly prejudicial on this particular hearing inasmuch as it was before the Juvenile Court.

The Court: The objection is overruled.

Mr. Vigil: Note our exception to the Court's ruling.

The Court: Any further questions?

Mr. Rossman: I have nothing further.

(Witness excused.)

Chester D. Poremba, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?

A. Chester D. Poremba.

Q. What is your work?

A. I am the court psychologist in the Denver Juvenile Court.

Q. Where were you educated?

A. The University of Denver.

Q. Do you have any degrees?

A. Well, I have the bachelor, master, and the doctor degrees.

[fol. 393] Q. So you are known as Doctor now?

A. Yes.

Q. Where were you educated?

A. At the University of Denver and the hospital, Colorado General Hospital is where I served my internship in clinical psychology.

Q. How long a period of time did you take for your education?

A. Well, it is equivalent to approximately seven or eight years of college.

Q. When did you graduate, Doctor?

A. In 1953, in June.

Q. And what has your work been since that time?

A. Since March, 1954, I have been the psychologist with the Denver Juvenile Court.

Q. Have you examined and tested many individuals during that period of time?

A. I would say so, yes.

Q. How many would you say?

A. Oh, gosh, I would have no way of knowing; it would be a sheer guess, I would imagine a couple thousand.

Q. Have you tested individuals like Bobby Gallegos, the defendant in this case?

A. I have.

Q. And you did examine and test Bobby Gallegos?

A. Yes, I did.

Q. From your examination and test, what would you say with reference as to his qualities of leadership?

A. Well, it would be my opinion that in terms of leader-[fol. 394] ship—well, to begin with, with Bobby, as a result of the testing, one would not consider the qualities of leadership but rather the degree to which he might be a follower.

Q. And what degree is that?

A. Well, it is a relative thing, but I think if you would put this on a scale whether he would be a leader or a follower, I would judge he would be much more a follower than a leader.

Q. What is your reason for this?

A. Well, again this is based on a battery test. In my talking to the boy, to begin with, he is not overly gifted, not retarded, but rather a limited child, but I think he has rather strong feelings of inferiority for which he is trying desperately to compensate and to agree at a proper time, and I am sure he would follow in a given situation.

Q. What are these tests you are referrring to?

A. The tests are the Wechsler intelligence test for children, this is an individual intelligence test; the Rorschach interrogating test; and then as an adjunct I administered the Draw a Person test, this is a fairly standard battery test.

Q. Did you have a grade of seventy involved in one of these tests?

A. Yes.

Q. Which one was that?

A. That was in the intelligence test—well, I should explain. This grade of seventy was obtained on a verbal [fol. 395] scale to reflect the relative functioning in two given areas in the verbal scale, namely, the ability to communicate, to express himself, and to communicate, and to establish a verbal communication or relationship with other people. He is quite depressed. This is where he got the I.Q. of seventy.

Q. Where does that place him with relation to children's ages?

A. Well, again, I would say if you could take 100 to be normal or average, we could figure he is roughly seventy per cent of what might be expected of a boy this age.

Q. Can you estimate what age he actually is in in grade seventy?

A. This, in the verbal range of the I.Q. test, if he is fifteen he would be about eight or nine; he speaks the language of a child you might expect at eight or nine.

Q. Now, with regard to the other tests, what did you find.

A. I got the feeling that he has insecure feelings, he had strong feelings of insecurity and inadequacy and his acts would be determined by what co-operation with others would bring him, namely attention of his companions. This youngster has a deep feeling of his own functioning and he feels he is a retarded, inadequate person, so to speak.

With reference to this word test, what did you say was the grade?

A. Seventy, he has a verbal scale I.Q. of seventy.

Q. In the over-all tests, what would you say would be his percentage with other children?

A. In the over-all picture—this is one way of talking [fol. 396] about it—he has a full scale I.Q. of 83. This puts him at the low range of intelligence.

Q. On an age pattern basis?

A. We normally do not think of this in what age group he would fall in. In other words, intelligence and characteristics and personalities are the way we group them. If you are talking in terms of percentage, it is more or less one way to look at it, he is operating at eighty-three per-

cent efficiency. Since he is age fifteen, I would say he is probably functioning at the level one might expect of a normal child of eleven, maybe ten.

Q. Were there any other significant findings in your other tests?

A. Well, this is a rather difficult question to answer. Significant of what?

Q. Significant to the point of his making a statement that may be figments of his imagination?

Q. It is my personal opinion, based on these tests, that he certainly is cognizant of that. On the basis of his own experience he can make statements. I had the feeling, however, that motivation plays such a strong part in this thing and this boy could imagine. I do feel, however, he can make statements for which he is responsible.

Q. Can he also make statements that may be wholly imaginary?

A. If you mean this boy is psychotic and therefore makes statements which are imaginary, I doubt it.

Q. On the basis of that test, did you feel he might make statements to attract attention?

[fol. 397] A. Yes.

Q. And would this be normal within the limit of your findings so far as your tests are concerned?

A. Yes.

Q. What is the reason for that?

A. Well, again, this feeling of inadequacy, children, as a matter of fact humans, any human will buy more or less anything that will bring him attention and recognition, and this boy feeling inadequate could very easily go along with these groups, a peer group, with any kind of an act of being one of the crowd. Being one of the crowd is important. This is one of the deficiencies he feels.

Q. And in line with your findings that he would be a follower rather than a leader, would it be easy for someone to lead him into making one of these statements?

A. Again, not evading the question, motivation plays a tremendous part, which would be strong, the need for making an impression, or the fear of a situation, getting out from under a fearful situation, it is very difficult to answer this particular question directly.

Q. Doctor, what do you think would be the effect of this

boy being confined for seven days in a room alone, although he might be permitted to have his lunch with other boys, would that have any effect on his making a statement?

A. I don't doubt that it would have an effect on his making a statement.

Q. And that would be to the effect of complying with whatever was requested of him, is that correct?

A. I imagine it could have that effect, yes.

[fol. 398] Mr. Vigil: That is all, Doctor.

Cross-examination.

By Mr. Rossman:

Q. Are you an officer of the Juvenile Court?

A. Yes.

Q. Are you an official of that Court?

A. I am employed by that Court; I assume I am an official.

Q. Do you bear any confidential relationship to the boys with whom you come in contact in that respect?

A. No.

Q. Doctor, when did you first come in contact with Robert Gallegos?

A. (Pause.)

Q. Before you look that up, you are not a medical doctor, are you?

A. I am not a medical doctor.

Q. And you are not a psychiatrist?

A. I am not a psychiatrist. I am a clinical psychologist who, by virtue of training is trained to examine and test people, to do clinical work, psychological evaluation of people, in order to determine the intelligence level, motivations, characteristics of people, attitudes, and so on and so forth, and to handle this material in such a way as to help to evaluate that particular person. It is the study of human behavior, and so on.

Q. Sort of like those who are capable of giving an analysis and aptitude tests, and so on. Is that correct?

[fol. 399] A. Yes.

Q. Doctor, there is nothing exact about this, is there?

A. No.

Q. And what you may say in a given case may or may not be the fact?

A. Correct.

Q. It is more or less a guess?

A. Yes, it is an educated guess.

Q. Anything you may say with reference to Robert Gallegos, an educated guess from a personal point, is based on the talks and discussions you may have had with him?

A. That is correct.

Q. And may not necessarily be true?

A. Right.

Q. And many times, I imagine, you may have been surprised with your educated guesses?

A. This I cannot answer.

Mr. Vigil: And he might be surprised by the number of times you have been right, could you not, Doctor?

(Argument of counsel.)

Q. You say you had some discussions with Robert Gallegos to arrive at your opinions?

A. An over-all discussion.

Q. You say he has an I.Q. of 83?

A. Correct.

Q. Is that an unusually low I.Q.?

A. I wouldn't say unusual.

Q. In other words, it fails into a pattern?

A. Yes, it occurs frequently.

[fol. 400] Q. That doesn't make Robert unusual?

A. In and of itself, no.

Q. You say he has a speaking capacity, if I may use the word, of seventy with reference to I.Q. Does that mean in his deportment, or environment, or education, he has only the capacity at age fifteen to speak the language of an eight or nine year-old?

A. Again, it is by virtue of capacity, environment and probably motivation.

Q. But you would not say here, or at any other time, that the lack of deportment is based on anything other than perhaps environment?

A. Heredity and environment.

Q. Yes, the mere fact his parents may not have seen fit to give him the education——

Mr. Vigil: If the Court please, that is assuming something. I object to that.

The Court: Objection sustained.

Mr. Rossman: I will rephrase the question.

Q. The mere fact he did not get an education at age fifteen would be just as good an answer as inability to speak the language of a fifteen year-old. Is that correct?

A. Correct.

Q. So there is nothing inherently wrong with that as far as Robert's physical or mental processes are concerned. Is that correct, Doctor?

A. Correct.

Q. And similarly with reference to his over-all I.Q.?

A. Correct.

[fol. 491] Q. And similarly with reference to his being what you call a follower rather than a leader?

A. I would say so.

Q. The world is generally composed of followers, isn't it, Doctor?

A. To varying degrees, yes.

Q. In other words, there are far fewer leaders in the world than followers, is that correct?

A. Yes.

Q. So being a follower does not diminish a person's character, does it?

A. It doesn't diminish character——

Q. Per se?

A. No.

Q. In other words, there is nothing wrong with it? You spoke of it before as a disease.

A. I didn't mean to imply that.

Q. And being inclined to follow is no unusual characteristic in an individual, is it?

A. No.

Q. Now, Doctor, you take a crowd—two people for instance, both of whom you would designate as followers and a voluntary act is committed, would you say one or both of them would have to be the leader in that particular act?

A. Would have to be both?

Q. Well, if the act were a voluntary act amounting to a crime, let us say?

A. Well, it has been my experience that seldom the co-defendants can, two people deciding to do a certain thing [fol. 402] together, the chances are about five million to one. In the Juvenile Court we are always interested in which one of the boys got the idea and sort of promoted the deal, but to that degree there probably is; but I suppose there is a possibility two people can engage in something without one being a leader.

Q. If you were to analyze two individuals, both of whom were engaged in the commission of a crime, and your analysis came up as expressed here, would both of them fall into the category of followers rather than leaders?

A. It could be.

Q. One of the followers would have to become the leader, would he not?

A. Probably.

Q. And you wouldn't know which one necessarily was the follower?

A. Necessarily, that is right.

Q. The mere fact Robert is a follower, would that make any statements he made untrue?

A. Not necessarily.

Q. Does he have the capacity, in your opinion, to tell the truth?

A. Yes.

Q. Did you find that his answers given to you were truthful?

A. I felt they were.

Q. Were they given to you, Doctor, for the purpose of gaining any attention or merely answering questions?

A. Well, they are not forms, these tests are a variety [fol. 403] and in some tests he had no opportunity to vocalize at all. I probably felt he had too much of a tendency to give up when the going got tough.

Q. But there was nothing inherently untruthful about what he told you?

A. I doubt it. I doubt if he could affect anything.

Q. So, he did make a statement and the chances are that the statement would be true. Is that right?

A. Yes, I think so.

Mr. Rossman: Thank you very much, Doctor.

Redirect examination.

By Mr. Vigil:

Q. The contrary would be true possibly, if he made a statement that he would do it in the hopes of gaining attention or to please someone because he had been kept and confined for seven days. Is that correct?
A. This could be possible.

Recross-examination.

By Mr. Rossman:

Q. Is that very likely, Doctor?
A. I wouldn't know.

Mr. Rossman: Thank you.
Mr. Vigil: That is all, your Honor.
The Court: Don't discuss your testimony regarding this trial.

(Witness excused.)

(Thereupon, a recess was taken to Thursday, June 18, 1959, 10:30 o'clock a.m.)

[fol. 404] Thursday, June 18, 1959 10:30 a. m.

Court convened pursuant to recess.
Appearances as heretofore noted.
Thereupon, the following proceedings were had, to-wit:

Melvin F. Hull, called as a witness by the defendants, having been first duly sworn, on oath testifies as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?
A. Melvin F. Hull.
Q. Where do you live, Mr. Hull?
A. 1220 East 29th Avenue.

Q. What is that location?

A. That is the superintendent's residence adjacent to the Denver Juvenile Hall.

Q. What is the Juvenile Hall?

A. The Juvenile Hall is a facility for providing security custody for boys and girls under the age of eighteen while awaiting disposition.

Q. Under whose jurisdiction is the Juvenile Hall?

A. It is under the jurisdiction of Philip B. Gilliam, Juvenile Judge.

Q. What is your position there?

A. I am the Superintendent.

Q. How long have you been so acting?

A. I have been Superintendent, it will be thirteen years [fol. 405] this coming July.

Q. When a boy is first sent to Juvenile Hall, how long do you keep him in what you call security?

A. We will keep them out of our program for about twenty-four hours.

Q. In the case of Robert Gallegos he was kept out of your program for a period of some seven days, is that correct?

A. No, that is not correct.

Q. How many days was he kept out of of your program?

A. He was brought in about 8:45 p. m. on January 1st. His twenty-four hours would then be up around eight o'clock on Friday, the second. The following day was Saturday. We have a school program that is carried on Saturday. He was kept out of the school program on Saturday, and on checking with our people he would then start in the school program which would be actually about the fifth day.

Q. So that is what you refer to as security?

A. We don't use the term security, we isolate them from the group.

Q. You isolate them from the group, for this period of time you keep them out of a program?

A. Yes.

Q. You permit them to go down and have luncheons and dinners with other boys?

A. That is true.

Q. Do they sit at their own table in this isolated group?

A. No, they may choose any seat they wish in the area of that particular group.

Q. Do you co-operate with the Police Department in doing this?

[fol. 406] A. We co-operate, to the best of our ability, with any agency we are dealing with.

Q. Apparently, you talked with my partner, Mr. Cisneros. Did yc . inadvertently tell him they were kept out of this program for seven days?

A. I don't recall that I told him specifically seven days.

Q. While Robert Gallegos has been in your custody, has he been any kind of a problem?

A. No, he has not. He has never been a problem during his entire stay with us.

Mr. Vigil: That is all.

Cross-examination.

By Mr. Rossman:

Q. Mr. Hull, what Mr. Vigil has referred to as security you referred to as being kept out of the school program?

A. That is correct.

Q. During the period of time a boy is kept out of the school program, what privileges does that boy have?

A. He comes in contact with the supervisor of the unit. A unit in this case is the group of boys ranging in age from fourteen through sixteen or seventeen. He is coming in contact with the supervisors. Each one works eight hours shifts. He is coming in contact with other youngsters brought in who stay out of the program during these first twenty-four hours. He is going to the diningroom along with the rest of them for meals. They have freedom in the unit. This unit has lunch, television and tables.

Q. How big an area does that unit cover?

[fol. 407] Oh, I would say about forty feet long and maybe thirty feet wide.

Q. And being kept out of the program, what does that mean, just what is he kept out of?

A. School and recreation program carried on under supervision.

Q. Is he under any duress of any kind during that time?

A. Certainly not.

Q. You referred to the fact Robert Gallegos was brought in on the evening of January 1st. Was any different treatment afforded him than any other boy who had been brought in on January 1st?

A. No, sir.

Q. Would any other boy not have attended the school program until Monday morning?

A. That would depend on the individual case.

Q. Was there any reason specifically why Robert did not attend the program until January 5th?

A. The supervisor has access to the offense, knows the offense that the youngster is being charged with and in this case he learned it was a serious one, an attack on a person, and the supervisor with this knowledge it falls in his discretion to hold them out of the program, giving him an opportunity to talk with him and learn as much as possible about him. During this time he is in close contact with him.

Q. Then this was a decision which was entirely that of the boy's supervisor?

A. That is right.

Q. This was not a decision of the Police Department?

[fol. 408] A. No.

Q. And not a decision of the Juvenile Officer of the Police Department?

A. The Police Department made no request of us.

Q. In other words, they made no request of you to treat him any differently than any other boy brought in?

A. No.

Mr. Rossman: That is all.

Redirect examination.

By Mr. Vigil:

Q. But you do co-operate with the Police Department so far as the offense is concerned?

A. Yes, we will.

Recross-examination.

By Mr. Rossman:

Q. By, "co-operate", what do you mean?
A. If they ask two boys be placed in separate bedrooms at night, if we are in position to do this, we do it for them.
Q. They made no such request in this case, did they?
A. No.

Redirect examination.

By Mr. Vigil:

Q. So you knew this case was a serious offense and you treated it as one. Is that correct?
A. I didn't. It was up to the supervisor.

Mr. Vigil: That is all.

Mr. Rossman: We have no further questions.

(Witness excused and cautioned by the court.)

[fol. 409] DARLENE E. FLEETWOOD, called as a witness by the defendants, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Vigil:

Q. Will you state your name?
A. Darlene E. Fleetwood.
Q. And you are employed by the Denver General Hospital, are you not?
A. Yes, I am.
Q. Do you know whether the deceased, Robert F. Smith was able to walk around for four or five days after he arrived at the Hospital?
A. I would have to check the record.
Q. Does your record show that?
A. Yes, I am sure that it would.

Q. You have looked at your records, have you not?
A. Yes.

Mr. Vigil: That is all.
Mr. Rossman: No questions.
The Court: Do not discuss your testimony with anyone else.
Mr. Vigil: If the Court please, we have no other witness available at this time. We wanted to call another witness.

(Colloquy of Court and counsel.)

The Court: Ladies and gentlemen of the jury, the normal procedure is that the prosecution puts on its case and rests, as they have done, and the defense then puts on [fol. 410] their case, and the prosecution then puts on rebuttal testimony. So, to speed up the trial you can call your rebuttal witness.
Mr. Rossman: Let the record show this is done with approval of counsel.
Mr. Vigil: Yes, that is correct.

REBUTTAL.

LOUIS KING, called as a witness by the People, having been first duly sworn, on oath testified as follows:

Direct examination.

By Mr. Rossman:

Q. Will you state your name, please?
A. Louis King.
Q. And your occupation?
A. Police Officer, City and County of Denver.
Q. Are you assigned to any particular jurisdiction or bureau?
A. Yes, the Juvenile Bureau.
Q. In what rank?
A. Detective.
Q. How long have you been employed as a police officer?
A. Going on thirteen years.
Q. How long have you been assigned to the Juvenile Bureau?

A. Approximately eighteen months.

Q. Were you so employed during the month of January, 1959?

A. Yes.

[fol. 411] Q. And specifically during the period of time from the 7th of January through the 14th of January, were you so employed?

A. Yes, sir.

Q. Did you have occasion to come in contact, in the course of your employment, with Eddie Martinez?

A. Yes, sir.

Q. Do you know who I am talking about when I refer to Eddie Martinez?

A. Yes.

Q. When did you first come in contact with him?

A. Approximately the second—the first of January.

Q. Did you also have occasion to come in contact with his father during that time?

A. Yes.

Q. During that period, did you receive a telephone call from Mr. Martinez, the father of Eddie Martinez?

A. No, sir.

Q. At no time from the 7th to the 14th of January?

A. No, sir.

Q. And particularly with reference to January 12th?

A. No, sir.

Q. Did you talk to Mr. Martinez over the telephone concerning his son?

A. No, sir.

Q. Are you the only person by the name of King connected with the Juvenile Hall?

A. Yes, sir.

Mr. Rossman: That is all.

[fol. 412] Cross-examination.

By Mr. Vigil:

Q. Are there other Kings on the Police Department?

A. Not that I know of.

Q. And do you keep track of the telephone calls that come in yourself?

A. No, sir.

Q. Who takes charge of the telephone calls that come in?

A. I don't understand what you mean.

Q. Do you have someone who answers the calls?

A. Anybody who happens to be in the office answers the telephone.

Q. So it could have been possible someone else answered the telephone and took a call for you without your knowing it. Is that correct?

A. Yes, sir.

Q. And he might have said, "Detective King is out," or something?

A. Yes, sir.

Q. Or someone might even have accepted a call for you that you don't know about?

A. Yes, sir.

Mr. Vigil: That is all.

Mr. Rossman: No further questions.

(Witness excused and cautioned by the Court.)

The Court: Let the record show that the Denver General Hospital records are now being returned to Mrs. Fleetwood which were taken under the order of the Court. Are those [fo. 413] the same records which you did turn into the Court?

Mrs. Fleetwood: Yes, your Honor.

(A recess was taken to 2:00 o'clock p. m.)

AFTERNOON SESSION 2:00 p.m.

Mr. Vigil: At this time, if the Court please, the defense rests.

Mr. Rossman: We have no further rebuttal, your Honor.

The Court: The People rest?

PEOPLE REST

Mr. Rossman: The People rest.

The Court: Ladies and gentlemen of the jury, that is all you will hear of testimony. The Court now has to hear some motions and prepare the instructions and then you will hear the instructions read to you and the argu-

ments of counsel and then you will have the case for deliberation. I imagine it will take all afternoon to get the instructions ready. So I will excuse the jury until tomorrow morning at ten o'clock.

RENEWAL OF MOTION THAT ALL THE TESTIMONY WITH REGARD TO THE ROBBERY BE STRICKEN, ETC. AND DENIAL THEREOF

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

Mr. Vigil: I want, if the Court please, to renew the motion that all the testimony with regard to the robbery be stricken from the record, that testimony consisting only of the statement, or statements, made by Bobby Gallegos, and also to strike from that same testimony all of the testimony in the record of a similar offense, for the reason that is wholly improper, immaterial and prejudicial, and [fol. 414] after all, this is to say that the same statement that is admitted as to the principal offense is admitted also to show a similar offense. In other words, we are attempting to show two offenses by the same statement and, as far as the law is concerned, you have to show the crime has been committed. They are attempting to show from the statement introduced a robbery, the similar offense, and the offense they seek to show by the same statement is another robbery.

(Discussion off the record.)

Mr. Vigil: Now, we are not saying anything with regard to the murder because they have shown a death by opinion evidence, we contend, but they have shown a death.

Assume the jury were to believe the death was caused by blows struck by this boy, possibly they have, then you might have some degree of manslaughter, but certainly not first degree murder, and we feel it is proper for the Court to strike that testimony related to the testimony of an alleged robbery. My contention is that you cannot have a similar offense, and the other thing is we object to the evidence on a similar offense, because there is no showing what the similar offense is admitted for, and the only reason it can be shown is to show plan, scheme, design, and so forth.

At this time we are asking the Court to strike the testi-

mony with regard to the alleged robbery and also the similar offense, so-called, of another robbery, for the reason that this offense charged in this case is a murder charge. [fol. 415] The record clearly shows there was no murder on the similar offense, if anything. I don't know what it was, because it was not a robbery. If not, it was, if anything, an attempted robbery and it was not shown who was the person robbed or what money was taken. I talked to this witness myself, and he stated he could not identify this boy particularly, and he could not say they had robbed him of anything because there was no money taken.

What I am saying here is, I am sure the Court is familiar with the rule on similar offenses. Assume we believe this; assume the jury believes this; then is this another murder, attempted murder? Of course not. It is not a similar offense in any regard, because what they are seeking to show by this statement is that there was another similar offense which was comprised of what they conceive to be a robbery.

Mr. Rossman: Your Honor, we have argued this point before. I think both the Williams case, 114 Colo., and the Snider case, 118 Colo., set forth the rule that the evidence is admissible and that the Court can instruct the jury that any reference to a similar offense would be considered only on what is permissible to be established.

(Argument of counsel.)

The Court: I will deny the motion.

RENEWAL OF MOTION FOR AN ORDER OF DISMISSAL AND FOR A DIRECTED VERDICT AND DENIAL THEREOF

Mr. Vigil: Note our exception to the Court's ruling.

Now, if the Court please, we would like to renew our motion for an order of dismissal and a directed verdict of not guilty for the reasons we have heretofore outlined, [fol. 416] and for the additional reason at this time that the evidence wholly fails to substantiate murder in the first degree as charged in the information.

The only evidence, and it still is uncorroborated in any particular, is the statement of this boy, and in that case we say they cannot secure a conviction in this case.

We have previously argued the case and I think the Court

is fully informed as to the effect of this, and I am sure the prosecution cannot point out any single instance where it was corroborated, and the courts have held that is insufficient on which to base a verdict of guilty in first degree murder.

The Court: The motion is denied.

Mr. Vigil: Note our exception to the Court's ruling.

Mr. Rossman: Let the record show that the Court has tendered the instructions to be submitted to the jury to the prosecution and that we have no objection to the form, or order, or content of said instructions, and similarly that we have been tendered the forms of verdict to be submitted to the jury and have no objection to said forms of verdict.

Mr. Vigil: At this time, if the Court please, I should like to make this in the form of a motion to the Court.

Defense objects to the giving of all instructions with regard to any phase of this case, for the reason the defense contends, first of all, that the prosecution is based on an information that is defective in many particulars; that the [fol. 417] information in this case must allege a death that occurred within a year and a day of the time that the blows were given; that the prosecution has failed to so allege in the information. That the prosecution, furthermore must set out the age of the defendant in order to eliminate the death penalty in the case and that this element has been left out of the information and that, therefore, the information is defective. That the prosecution must allege that the defendant, because of his age, could distinguish good from evil, and that this allegation has been left out of the information. And for these reasons defense feels that the charge is improperly laid in this case and that the Court should properly refuse to instruct on any degree of murder and should dismiss the information.

The Court: The motion is denied.

Mr. Vigil: Save an exception to the Court's ruling.

COUNSEL FOR DEFENDANT REQUESTED INSTRUCTIONS

And Thereupon, the defendant, by his counsel, tendered and requested the Court to give the following instructions, which are in the words and figures following:

"No. 1

"To constitute murder of the first degree the killing must have been done wilfully, deliberately and with premeditation; that is, intentionally, sanely and with prior deliberation and without legal justification or excuse. 'Wilfully,' as used in the information and these instructions, means intentionally, that is, not acciden- [fol. 418] tally. 'Deliberation' means an intent to kill, executed by the slayer in a cool state of the blood, in furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose, and not under the influence of a violent passion provoked by some cause calculated to override the judgment. 'Premeditated design to kill' means a previously designed or formed intention to kill. But while the law requires, in order to constitute murder of the first degree, that the killing should be wilful, deliberate and premeditated, it does not require that the wilful intent, premeditation or deliberation should exist for any particular length of time before the killing. It is not necessary that the killing should have been considered, brooded over or reflected upon for a week, a day or an hour. It is sufficient if there was a design and a determination to kill distinctly formed in the slayer's mind at any moment before the act which caused the death of the person killed, and that the slayer acted upon such design and determination. No particular time need intervene between the formation of the intent to kill and the act of killing. It matters not how short the interval, if it was sufficient for one thought to follow another. It is sufficient if deliberation was had to form a design or purpose to take life and to put that design or purpose into execution."

(Stamped) "Requested by the defendant and refused by the Court. (Signed) H. Joe Rawlinson, Jr., Judge."

[fol. 419] "Instruction No. 2

"The Court instructs the jury that the prosecution has the burden of proving sanity beyond a reasonable doubt."

"Instruction No. 3

"The Court instructs the jury that children are more susceptible to influence and suggestion and the tendency to imagine than grown-ups."

Instruction No. 4

"The Court instructs the jury that extrajudicial statements, as Bobby Gallegos made in this case, are exceptions to the hearsay rule which excludes hearsay testimony and must be received with great caution."

"Instruction No. 5

"The Court instructs the jury that an infant is incapable of making an admission which can affect his rights and a fortiori. The admissions of another person cannot affect an infant's rights nor the admission of infants bind other persons."

"Instruction No. 6

"The Court instructs the jury that Bobby Gallegos is not liable for the homicide and should be found not guilty if the injury inflicted by one boy was not fatal, but death was caused by disease and it was not itself caused by the injury, although the deceased may not have recovered from the effects of the injury."

[fol. 420] "Instruction No. 7

"The Court instructs the jury that circumstantial evidence as defined in these instructions is to be received with caution and must be inconsistent with innocence on the part of Bobby Gallegos."

"Instruction No. 8

"The Court instructs the jury that even severe blows given with intent to harm but not to kill is not murder in the first degree."

"Instruction No. 9

"The Court instructs the jury that the act of killing and the guilty intent must concur to constitute the offense."

"Instruction No. 10

"The Court instructs the jury that to find Bobby Gallegos guilty, the jury must find all of the issues against Bobby Gallegos have been proven by the prosecution beyond all reasonable doubt, including the issue of specific intent, deliberation, and premeditation."

"Instruction No. 11

"The Court instructs the jury that a conviction of a crime cannot be upheld where it is based upon the uncorroborated statements of persons accused. There must be evidence of the corpus delicti apart from the statements of the boy, Bobby Gallegos."

[fol. 421] "Instruction No. 12

"The Court instructs the jury that a statement to have been voluntarily made, must proceed from the spontaneous suggestion of party's own mind; free from the influence of an extraneous disturbing cause, of any kind."

"Instruction No. 13

"The Court instructs the jury that if a common design does not contemplate the commission of a homicide, and is of such a nature that a homicide will not be a natural or probable result, participation in that design is not of itself sufficient to make one responsible for a homicide committed concurrently with the execution of the common plan, by the independent act of a confederate growing out of his private malice or other cause having no connection with his common object."

"Instruction No. 14

"The Court instructs the jury that if the jury has a reasonable doubt whether the death was caused by a blow struck by Bobby Gallegos or whether the

death occurred by other means, such as treatment in the hospital, illness, falling, or otherwise caused, Bobby Gallegos should be acquitted."

"No. 15

"If you do not find the defendant guilty of murder of either the first or second degree, or of voluntary [fol. 422] manslaughter, it will be your duty to determine whether or not he is guilty or involuntary manslaughter, as defined and explained in these instructions.

"A statute of the state provides as follows:

"'Involuntary manslaughter shall consist in the killing of a human being without any intent so to do; in the commission of an unlawful act or a lawful act which probably might produce such a consequence, in an unlawful manner; Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjuded to be murder.'"

"If you find the defendant guilty of involuntary manslaughter, you should so state in your verdict.

"If you do not find the defendant guilty of murder of either the first or second degree, or of voluntary manslaughter, or of involuntary manslaughter, you you should find the defendant not guilty, and should so state in your verdict."

"Instruction No. 16

"The Court instructs the jury that the statutes of this state define excusable homicide by misadventure as follows:

"'Excusable homicide by misadventure is when [fol. 423] a person is doing a lawful act without any intention of killing, yet unfortunately kills another.'

"The court further instructs the jury that one of the defenses interposed by the defendant is that the killing was excusable,—that is, that is was by accident

or misadventure. The court instructs you that three elements enter into this defense:

"1st. It must appear that —— was engaged in a lawful act.

"2nd. That he was free from carelessness; and

"3rd. That he did not intend to but accidentally killed the deceased."

No. 17

"If you do not find the defendant guilty of murder of the first degree, it will be your duty to determine whether or not he is guilty of murder of the second degree, as defined and explained in these instructions.

"Murder of the second degree is the unlawful killing of a human being with malice aforethought, but without deliberation and premeditation.

"To constitute murder of the second degree the malice must be implied malice, as distinguished from express malice. The statute provides that 'malice shall be implied when no considerable provocation appears, or when the circumstances of the killing show an abandoned and malignant heart.' Malice is not [fol. 424] implied by law, or as a matter of law. Whether malice shall or shall not be implied under the circumstances of this case is a question for you to determine for yourselves from the evidence.

"If, therefore, you find from the evidence beyond a reasonable doubt that the defendant, at any time before the filing of the information in this case, at the City and County of Denver, in the State of Colorado, without lawful justification or excuse, as defined and explained in these instructions, unlawfully, wilfully and with implied malice, killed —— you should find the defendant guilty of murder of the second degree as charged in the information; otherwise you should not find the defendant guilty of murder of the second degree."

"No. 18

"If you do not find the defendant guilty of murder of either the first or second degree, it will be your duty to determine whether or not the defendant is guilty

of voluntary manslaughter, as defined and explained in these instructions.

"Manslaughter is the unlawful killing of a human being, without malice either express of implied, and without any mixture of deliberation whatever. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing or an attempt by the person killed to commit a serious personal injury on the person killing. [fol. 425] The killing must be the result of that sudden and violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

"The provocation which will reduce a voluntary killing from the crime of murder to that of manslaughter must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. In other words, the passion must proceed from an adequate cause.

"If you find the defendant guilty of voluntary manslaughter you should so state in your verdict."

"Instruction No. 19

"You are instructed that robbery is defined to be the felonious and violent taking of money, goods or other valuable thing from the person of another by force and intimidation, and that to constitute the crime of aggravated robbery the defendant must have been at the time of the robbery armed with a dangerous weapon, with intent, if resisted, to kill, maim or wound the person robbed, or some other person."

[fol. 426] But the Court refused to give each of said requested instructions to the jury, which refusal, signed by the Judge, appears on the face of each of said requested instructions.

And Thereupon the following proceedings were had in connection with the defendant's requested instructions:

Mr. Vigil: Defense objects to the refusal by the Court to give all of defendant's tendered instructions and specifically states that these instructions are applicable to the case and to the facts as shown.

Defendant's tendered instruction No. 1 is an instruction defining first degree murder, and it is the contention of the defendant that this instruction is applicable in this case for the reason that it involves deliberation and the premeditated design to kill, which are applicable in this case, as in any case of murder where the jury can accept part of the facts and reject part of the facts.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 2 for the reason that this instruction refers to sanity and, although sanity has not been raised as a formal matter, in any case the prosecution must prove sanity beyond a reasonable doubt.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 3 for the reason that this instruction refers to the susceptibility of children and is applicable in this case.

The defense objects to the refusal by the Court to give defendant's instruction No. 4 for the reason that this instruction refers to the statement made by Bobby Gal- [fol. 427] legos, the defendant, and is applicable particularly because of the age of the defendant.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 5 for the reason that this instruction refers to admissions of a defendant. It is the position of counsel herein that 3 Colo. 291, which is the case that states this law, has never been overruled and that it is the law and should be the law, that in any situation where a minor makes admissions or statements that those statements or admissions cannot bind the mipor's rights, and the admissions of any other person cannot affect the defendant's rights and this is the law in other cases and should be followed in criminal cases for reasons which must be apparent to the Court.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 6 for the reason that

it appears that this instruction is applicable to the facts herein.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 7 for the reason that this instruction is applicable under the circumstances of this case.

The defense objects to the refusai by the Court to give defendant's tendered instruction No. 8, which refers to the intent with which any blows might have been struck in this case, and under the law in Colorado the striking of mere blows cannot be murder in the first degree.

The defense objects to the refusal by the Court to give [fol. 428] defendant's tendered instruction No. 9 for the reason that said instruction is applicable to the case.

The defense objects to the refusal by the Court to the giving of defendant's tendered instruction No. 10 for the reason that this instruction is applicable to the case.

The defense objects to the refusal by the court to give defendant's tendered instruction No. 11 for the reason that this instruction refers to uncorroborated statements of persons accused, and in this case the contentions of the defense is that the statements of Bobby Gallegos are wholly uncorroborated.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 12 for the reason that the instruction is applicable to this case and should be given.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 13 for the reason that this instruction is a proper instruction and should properly be given.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 14 for the reason that this instruction refers to whether or not the jury has a reasonable doubt as to whether death was caused by blows struck by Bobby Gallegos or whether death occurred by other means such as treatment in the hospital, and the instruction is proper and should be given.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 15 for the reason the defense contends all degrees of murder should — sub-

[fol. 429] mitted to the jury, including involuntary manslaughter as contained in instruction No. 15.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 16 for the reason that this instruction involves misadventure and the jury may very well believe that misadventure is in this case.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 17 for the reason that the defense contends all degrees of murder are in this case and particularly murder of the second degree.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 18 for the reason that the defense contends all degrees of murder, including voluntary manslaughter, are involved and that this instruction should be given in this case.

The defense objects to the refusal by the Court to give defendant's tendered instruction No. 19 on aggravated robbery for the reason that it is our contention that the prosecution in this case is based upon aggravated robbery, and the opening statements and arguments of counsel, so far as the prosecution is concerned, have contended that aggravated robbery is involved, and it is our contention where there is a reasonable doubt as to whether or not the defendant is entitled to an instruction on simple or aggravated robbery that the Court should give the instruction on aggravated robbery. It is further the contention of the defense that under the statute involving murder in the [fol. 430] first degree where the statute speaks of an act requiring intent where robbery is committed, that the legislature meant only aggravated robbery, because cases in Colorado indicate that where murder is committed with fists alone that it cannot be aggravated robbery; and furthermore, the facts in the case indicate that this is a case of aggravated robbery, not only from the facts established in the District Court, but the facts as presented in the Juvenile Court, indicate that the Police Department's entire reports consider this a case of aggravated robbery.

With reference to specific objections to the instructions to be submitted to the jury, the defendant specifically objects to the giving of instruction on first degree murder, for the reason that first degree murder is not within the purview of this case, the prosecution having failed com-

pletely to establish the fact of a robbery beyond a reasonable doubt, and, furthermore, having failed to establish the element of death beyond a reasonable doubt, except by opinion evidence, there is no corroborative evidence whatsoever in this case.

The defense objects to the giving of Instruction No. 2 for the reasons heretofore advanced.

Defense objects to the giving of Instruction No. 3 for the reasons heretofore advanced.

The defense objects to the giving of Instruction No. 4 for the reasons heretofore advanced.

The defense objects to the giving of Instruction No. 5 for the reasons heretofore advanced.

[fol. 431] The Defense objects to the giving of Instruction No. 6 for the reasons heretofore advanced and for the reason this instruction contemplates murder in the first degree and further contemplates a robbery in this case which has not been established beyond a reasonable doubt as required by the law.

The defense objects to the giving of Instruction No. 7 for the reason this instruction is inapplicable for the reason the crime of robbery has not been established beyond a reasonable doubt as required by the law.

The defense objects to the giving of Instruction No. 8 for the reason it is not applicable for the reasons heretofore advanced.

The defense objects to the giving of Instruction No. 9 for the reasons heretofore advanced.

The defense objects to the giving of Instruction No. 10 for the reason heretofore advanced.

The defense objects to the giving of Instruction No. 11 for the reasons heretofore advanced.

The defense objects to the giving of Instruction No. 12 for the reasons heretofore advanced.

The defense objects to the giving of Instruction No. 13 for the reasons heretofore advanced and for the further reason that the experts who were called to testify were doctors who testified as to an ultimate fact, the fact of death and, therefore, their opinion is the only basis upon which the death can be based. In this case there is no other evidence of any kind testified to except this opinion expressed by the doctors and the further fact that one

[fol. 432] doctor in this case testified he based his opinion upon talking to other doctors.

The defense objects to the giving of Instruction No. 14 for the reasons heretofore advanced.

And defense objects to the giving of Instruction No. 15 for the reason this instruction relates to what is known in law as similar offenses; that there are no similar offenses available in this case for the reason that the crime charged herein is one of murder; that the similar offense sought to be introduced herein is one only of assault, or aggravated assault, and for that reason it is inapplicable to this case. The similar offense rule contemplates an offense similar to the one on trial, not any offense whatsoever which the prosecution seeks to bring into the case, and the only effect of such a statement as made by the defendant being admitted into evidence by the Court is to prejudice the jury against the defendant.

The defense objects to the giving of Instruction No. 16 for the reasons heretofore advanced.

The defense objects to the giving of Instruction No. 17 for the reasons heretofore advanced.

The defense objects to the giving of any verdicts in this case for the reasons heretofore advanced.

The defense objects specifically to the giving of any verdict in first degree murder for the reason that the evidence in this case has wholly failed to establish any degree of murder for the reason that the prosecution is based upon inadmissible statements that were used in a previous prose-
[fol. 433] cution in the Juvenile Court, and for the further reason that the evidence has wholly failed to establish beyond a reasonable doubt any robbery or attempted robbery and the prosecution, therefore, must fail.

The defense objects to the refusal by the Court to give verdicts as requested by the defendant on voluntary manslaughter, involuntary manslaughter and second degree murder because it is our contention that all of these elements are within the purview of the case.

The defense objects to the giving of a verdict on first degree murder for the reason that it is our contention that first degree murder has not been established in this case, and, furthermore, the Court should have dismissed the in-

formation and should have properly directed a verdict of not guilty in this case.

The Court: The Court overrules the objections.

Mr. Vigil: Note our exception to the Court's ruling.

Mr. Rossman: Let the record show that the testimony of one of the defense witnesses elicited from said witness the fact that he had been previously convicted of a felony, namely aggravated robbery, and that a suggestion was made to counsel for the defendant as to their desire to have any instruction pertaining to the former conviction suffered by their witness and that this matter has been considered.

Mr. Vigil: If the Court please, we should like to have an instruction on aggravated robbery submitted in connection with the offer as made by the District Attorney, the statement as made by the District Attorney. We contend that [fol. 434] since the information was elicited by the District Attorney on aggravated robbery that the only proper thing to do would be to include the instruction on aggravated robbery.

The Court: Overruled.

Mr. Vigil: Save an exception to the Court's ruling.

Thereupon, a recess was taken to Friday, June 19, 1959, at 10:00 o'clock a.m.

[fol. 435] Friday, June 19, 1959 10:00 a.m.

Court convened pursuant to recess.

Appearances as heretofore noted.

Thereupon, the following proceedings were had, to-wit:

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

Mr. Vigil: May it please the Court, with reference to the other degrees of murder that we requested previously, the Court will recall we argued a motion to waive the jury. At the time of the argument on the motion the Court ruled that the reason the jury could not be waived was because the jury had to determine the degrees of murder and we pointed out that this was a case of robbery in which the only degrees would be first degree murder and included degrees and in spite of the argument the Court ruled adversely on the waiver of the jury. We feel the other degrees

of murder should properly be included under the statutes of Colorado.

The Court: The motion is denied.

Mr. Vigil: Note our exception to the ruling of the Court.

COURT'S INSTRUCTIONS TO THE JURY IN THE PRESENCE OF THE JURY

And thereupon the Court instructed the jury in writing as follows:

The Court: Ladies and gentlemen of the jury, the Court will now read the instructions and the law which will govern you in arriving at your verdict.

[fol. 436] "Instruction No. 1

(Omitting the title and venue)

"Ladies and Gentlemen of the Jury: The Information alleges that, on the twenty-sixth day of January, A. D. 1959, at the City and County of Denver, and State of Colorado, Robert Elmer Gallegos and Edward Raymond Martinez did feloniously, wilfully and of their premeditated malice aforethought kill and murder one Robert F. Smith; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Colorado.

"The foregoing is the Information filed in this case and is merely an accusation and is not to be considered by you as any evidence tending to prove or disprove the guilt or innocence of the defendants.

"To the foregoing Information, the defendants have entered pleas of not guilty, and this is the issue that you are called upon to decide."

Ladies and gentlemen of the jury, as far as the defendant Edward Raymond Martinez is concerned, that has been taken from your consideration. The Court ruled on that as a matter of law. So the only issue you have to decide is the guilt or innocence of one Robert Elmer Gallegos.

"Instruction No. 2

"The information is a mere accusation against the defendant, and is not in itself any evidence of the guilt of the defendant, and no juror should permit himself [fol. 437] to be influenced to any extent, however slight, against the defendant because or on account of the filing of such information."

"Instruction No. 3

"The following is the statutory definition of a crime, viz: 'A crime consists of a violation of a public law in the commission of which there shall be an union or joint operation of act and intention.' "

"Instruction No. 4

"The law presumes the defendant to be innocent, and this presumption continues until overthrown by evidence sufficient to exclude all reasonable doubt of his guilt. This rule of law which clothes every person accused of crime with a presumption of innocence, and imposes upon the People the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty of crime, to escape, but is a humane provision of the law, intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished."

"Instruction No. 5

"Intent is manifested by the circumstances connected with the perpetration of an offense and the sound mind and discretion of the person accused. A person shall be considered of sound mind who is neither an idiot nor afflicted with insanity, and who has arrived at the [fol. 438] age of fourteen years, or before that age if such person knows the distinction between good and evil."

"Instruction No. 6

"Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the

various means by which death may be occasioned. All murder which shall be perpetrated by means of poison or lying in wait, torture, or any kind of wilful, deliberate and premeditated killing; or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary shall be deemed murder of the first degree."

"Instruction No. 7

"The statute defines robbery as follows: 'Robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation.' "

"Instruction No. 8

"The Court instructs the jury that in order to find the defendant guilty of murder in the first degree, you must find that the defendant committed the crime of robbery against the deceased, Robert F. Smith; if you fail to so find, or if you have a reasonable doubt with reference thereto, your verdict should be not guilty."

[fol. 439] "Instruction No. 9

"You are instructed that the People must prove to your satisfaction, beyond a reasonable doubt, that the death of Robert F. Smith occurred as a result of the blows inflicted upon him during the course of a robbery. If you fail to so find, or if you have a reasonable doubt with reference thereto, you must find the defendant not guilty."

"Instruction No. 10

"The burden of proof is upon the People to prove each and every material allegation contained in the information, to your satisfaction beyond a reasonable doubt, and if you find from the evidence that the People have failed to so prove any one or more of the material allegations in the information, you will find the defendant not guilty. Upon the other hand, of you find from

the evidence that each and every material allegation in the information has been proven beyond a reasonable doubt, you will find the defendant guilty."

"Instruction No. 11

"You are further instructed that, while you are not to find the defendant guilty, if you entertain a reasonable doubt of his guilt, you are not to search for a doubt. The doubt referred to must be such a doubt as would naturally arise in the mind of a reasonable person upon review of all the evidence in the case. It means a serious, substantial and well-founded doubt, and not [fol. 440] a mere possibility of a doubt. It is such a doubt as, in the important transactions of life, would cause a reasonable and prudent person to hesitate and pause, and when you can say, after considering all the evidence in the case, that you have an abiding conviction of the truth of the charge, then you are in law satisfied beyond a reasonable doubt."

"Instruction No. 12

"The court instructs the jury that they are the sole judges of the credibility of the witnesses, and of the weight to be given to the testimony of each witness. In determining the weight to be given to the testimony of the witnesses, you should take into consideration their means of knowledge, strength of memory and opportunities for observation, as shown by the evidence in the case, the reasonableness or unreasonableness of their statements, the consistency or inconsistency of their testimony, the motives actuating them, so far as such motives appear from the evidence in the case; the fact, if it be a fact, that they have been contradicted by other evidence in the case, their bias, prejudice or interest, if any has been shown, their manner or demeanor upon the witness stand, and all other facts and circumstances shown by the evidence, which in your judgement affect the credit due to them respectively. If after considering all the evidence you find that any witness has [fol. 441] wilfully or corruptly testified falsely to any fact material to the issues in the case, you have a right

to disregard the whole or any part of his or her testimony."

"Instruction No. 13

"You have heard the testimony of witnesses who have given evidence and testified as experts, giving opinions. This class of testimony is proper and competent concerning matters involving special knowledge or skill, or experience upon some subject which is not within the realm of the ordinary experience of mankind and which requires special research and study to understand. The law allows those skilled in that special branch to express opinions and, upon a hypothetical state of facts stated to them, to say whether or not, according to their experience and research, a fact may or may not exist. But nevertheless, while their opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. The jurors are not bound by the testimony of experts; their testimony is to be canvassed as that of any other witness; just as far as their testimony appeals to your judgement, convincing you of its truth, you should adopt it; but the mere fact that witnesses were called as experts and gave opinions upon a particular point, does not necessarily obligate the jury to accept their opinions as to what the facts are, in [fol. 442] the face of the testimony of witnesses claiming to have actual knowledge of the facts."

"Instruction No. 14

"The Court instructs the jury that it is a rule of law that a confession of one when freely and voluntarily made is evidence against the one making such confession. The confession, however, should be strengthened by facts and circumstances corroborative of its truth. In this case, if you believe the defendant Robert Elmer Gallegos freely and voluntarily made the confessions which have been introduced, then you should give them credit and weight as you deem them entitled to.

"On the other hand, if you find and believe from the evidence that the confessions were neither freely nor voluntarily made, or were obtained from the defendant

upon promises made to him which operated on his mind and inspired him in hope of escaping punishment, or the hope of other benefits to him, then you should in arriving at your verdict disregard any part or all of such confessions which you may deem unworthy of credence.

"In determining whether the statements were made freely and voluntarily, you may consider the age, maturity, physical and mental condition of the defendant, the length of his confinement, his opportunity or lack of opportunity to seek friendly or professional aid, the advice or lack of advice given him as to his constitutional rights, and all other facts and circumstances [fol. 443] surrounding such confession."

"Instruction No. 14-A

"The Court instructs the jury that in this case what is known in law as an 'alibi', that is, that the defendant was at another place at the time the crime charged in the information was committed, is relied upon by the defendant; and the court instructs the jury that such a defense is as proper and legitimate, if proved, as any other, and all the evidence bearing upon point should be carefully considered by the jury, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty.

"The defense of an alibi, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime the accused was at another place so far away and under such circumstances that he could not with any ordinary exertion have reached the place where the crime was committed, so as to have participated in the commission thereof; and to render the proof of an alibi satisfactory the evidence must cover the whole time of the transaction in question, so as to render it improbable that the defendant setting up such defense could have committed the act."

[fol. 444] "Instruction No. 15

"There is some evidence with reference to another transaction than that charged in the information. This evidence is admissible only as bearing upon the question of whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part, and you can consider such evidence for no other purpose. The defendant cannot be tried for or convicted of any offense not charged in the information."

"Instruction No. 16

"THE COURT INSTRUCTS THE JURY:

"That while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly provides that his neglect or refusal to testify shall not create any presumption against him. And in this case, a failure of the defendant to testify should not be taken or considered by the jury as any evidence of his guilt or innocence."

"Instruction No. 17

"These instructions contain the law that will govern you in this case, and in determining the facts you should consider only the evidence given upon trial. Evidence offered at the trial and rejected by the Court and the evidence stricken from the record by order of the Court, should not be considered by you. The opening state-[fol. 445] ments and arguments of counsel and the remarks of the Court and of counsel are not evidence.

"The arguments, statements and objections made by counsel to the Court or to each other, and the rulings and orders made by the Court, and the remarks made by the Court during the trial and not directed to you, should not be considered by you in arriving at your verdict.

"No single one of these instructions states all the law applicable to the case, but all of these instructions must

be taken, read and considered together, as they are connected with and related to each other as a whole.

(Signed) H. Joe Rawlinson, Jr., Judge."

And thereupon followed argument of counsel, at the conclusion of which the jury retired in charge of sworn bailiffs to consider of their verdicts, the 13th juror having been excused by the Court.

And thereafter and on the same day, the jury returned into court with their verdict, which said verdict (omitting the venue and title) is in the words and figures following:

VERDICT

"We, the jury, find the defendant, Robert Elmer Gallegos, guilty of First Degree Murder as charged in the information, and fix the punishment at life imprisonment in the State penitentiary.

(Signed) James A. Newman, Foreman."

[fol. 446] Thereupon, at the request of counsel for defendant, the Court ordered the Clerk to poll the jury.

And thereupon, as the jurors' names were called, the Clerk propounded the following question to each of them:

"Was this and is this your verdict?"

To which each of said jurors responded in the affirmative.

Whereupon the Court ordered that the verdict be received and spread upon the record.

Mr. Vigil: The defendant excepts to the verdict and request time in which to file the necessary motions.

The Court: You may have thirty days to file motions and defendant will be remanded to Juvenile Hall.

[fol. 447] IN DISTRICT COURT OF DENVER COUNTY

MOTION FOR A NEW TRIAL—Filed July 20, 1959

"Comes now the defendant, Robert Elmer Gallegos, by counsel, and moves this Honorable Court for an order setting aside and vacating the verdict returned heretofore, and granting the defendant a new trial, and as grounds therefor, the defendant states that the Court erred in that:

"1. The verdict of the jury is contrary to the law and the evidence.

"2. That the prosecution failed to prove the venue beyond a reasonable doubt.

"3. The Court refusal to grant defendant a motion for a Change of Venue from the State District Court, City and County of Denver, to the Juvenile Court, City and County of Denver.

"4. The Court's refusal to grant a Motion for Severance, since the age of the defendants was a material element in this case, and the defendants were entitled to a separate trial.

"5. The Court's refusal to quash the information on the grounds that the information did not state that the defendants should know the difference between good and evil, this being a material part of the charge.

"6. The Court's refusal to quash and dismiss the information in that the information was duplicitous, since both defendants are charged with doing the same [fol. 448] act, and the information did not contain sufficient facts upon which to sustain the charge contained therein.

"7. The Court's refusal to grant a motion for Waiver of Jury Trial.

"8. The Court's refusal to accept a Plea of Former Jeopardy for the reason that the defendants had heretofore been tried and punished in another proceeding, and that similar and the same evidence was used in the present action herein.

"9. The Court's refusal to grant a preliminary hearing.

"10. In refusing to grant defendants' motion for

mistrial on the opening statement of the District Attorney in which he alleged that the psychiatrists had been paid by tax money which was prejudicial to the defendants.

"11. In admitting the endorsement of witnesses of the three psychiatrists and of Dr. D. D. Kirk and Allen Aoyagi, the witnesses were endorsed on the 8th of June, 1959, and defense was not notified until the morning of the trial.

"12. In refusing to exclude testimony of psychiatrists on the grounds that the psychiatrists were defendant's witnesses and as there was privileged and confidential communication between the defendants and the doctors.

"13. In overruling the defendant's objections for the recall of Dr. Polley since Dr. Polley had been examined [fol. 449] by the prosecution, and was recalled by the prosecution over defendant's objections.

"14. In refusing to exclude Dr. Ogura's Coroner's Report on the grounds that the report was based on hearsay since he testified he had talked to other doctors in formulating his opinion.

"15. In refusing to exclude statement or confession on the grounds that confession was elicited from the boys, one eight years old, was never charged, the other was twelve years old, and the last fourteen years old, and refusing to grant defendants' motion to Suppress the Evidence on the grounds that the defendants were never advised of their constitutional rights, that this statement or confession could be used against them in a trial of this kind.

"16. In refusing to grant defendants' Motion to Suppress the Evidence on the grounds that this evidence had been used in a hearing in Juvenile Court in which the two defendants were sentenced to Golden, and is in direct conflict with the Laws of Colorado, 1953, CRS 22-8-1, providing that no evidence which is used at a hearing of a juvenile delinquent can be used in another court proceeding whatsoever.

"17. In refusing to grant defendant's Motion to to Suppress the Evidence on the grounds that the defendants are of such ages, 12 and 14 respectively, and under the laws of the United States of America and

the State of Colorado, they did not have sufficient understanding to be bound by any statements or any [fol. 450] agreements made by them.

"18. In refusing to grant defendant's Motion to Suppress the Evidence on the ground that the statements could not be voluntary regardless of the supposed voluntariness of the statements because of the minority of the two boys herein and the fact that they had no representation and could not make statements that could bind them in any way in any civil or criminal proceedings.

"19. In refusing to grant defendant's Motion for Mistrial and any Reference to Juvenile Court Hearing as being prejudicial.

"20. In granting prosecution's motion to instruct the jury to disregard Mrs. Gallegos' testimony about not being allowed to see Robert Gallegos on the grounds that it was hearsay. No objection having been made at the time of the testimony, the Court erred in instructing the jury to disregard Mrs. Gallegos' testimony when the objection was made later. The testimony in question was given on direct examination. The motion to disregard was made during the cross examination.

"21. In allowing the prosecution to introduce into evidence a shoe brush allegedly used in a similar offense, this being immaterial and prejudicial to the defendant.

"22. In allowing prosecution to comment or make reference to a knife when there was no evidence before the Court about a knife being used.

"23. In refusing to grant defendant's Motion to [fol. 451] Dismiss on the grounds that to prove aggravated robbery, you have to show defendant was armed with a dangerous weapon. There being no evidence of a dangerous weapon used in the alleged commission of the crime.

"24. In refusing to grant defendant's motion to quash because the information did not state the age of the boys, which is a material element in this case, and the fact that the death had occured within one year and a day of the alleged attack

"25. In overruling defendant's objection to the order of proof in that the death of the deceased was proved before any corpus delicti was proved.

"26. In refusing to grant defendant's motion to strike testimony of all witnesses.

"27. In refusing to grant defendant's motion to strike out the written confession on the grounds that the prosecution had not proved the corpus delicti.

"28. In refusing to grant defendant's motion to the admission of the written confession on the grounds that the corpus delicti of the robbery which is an essential element in this case was not proved by corroborating evidence.

"29. In refusing to grant defendant's motion to strike testimony of any similar offense on the grounds that the only similar offense that could be introduced would be the evidence of another murder. In this case all the evidence of similar was at the most an assault which could in no way be considered a similar offense. [fol. 452] "30. In refusing to grant defendant's motion for a directed verdict based on the fact that there was no corroborative evidence.

"31. In overruling defendant's objection to the prosecution's question to witness Mr. Martinez about being convicted of any prior felony and going into the type of felony which he was convicted and the time and the place.

"32. The refusal of the Court to give defendant tendered instructions, being defendant's numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

"33. Refusal to give tendered verdict on second degree murder, voluntary manslaughter, and involuntary manslaughter, and misfortune as proper degrees of murder, after having previously ruled that defendants could not waive jury, because jury had to determine first or second degree.

"34. Refusal to instruct the jury to disregard statement, since the boys had already been committed in the Juvenile Court and committed to Golden.

"35. Refusal to instruct the jury to disregard statements of Deputy District Attorney, Mel Rossman, in final argument in which he stated in his closing argu-

ment, 'that all the hoodlums of Denver are waiting for your verdict.' There was no evidence before the jury to substantiate this statement, it was prejudicial and violated the rights of defendants herein.

"36. In failing to instruct the jury to disregard statement of Deputy District Attorney, Rossman, in [fol. 453] final arguments in which he stated that most hotels that do not have any running water have water in pitchers and glasses from which to drink, there being no evidence before the jury of this fact.

"37. Refusal to withhold alleged confessions from consideration of the jury since it was affirmatively shown that statements were based on what eight year old Richard had stated and he was disqualified as a witness under the law. Also the statements were so mixed that the officer first investigating stated he could not separate one from another of the three boys that were questioned simultaneosly. All three boys were questioned simultaneously and one statement was secured and signed by all three, and the Court permitted the part allegedly made by Bobby Gallegos, 14, to be admitted, but withheld the statements of Richard, 8, and Eddie Martinez, 12. Furthermore it was shown that no constitutional warning was given as required.

Respectfully submitted, (Signed) Charles S. Vigil. (Signed) Roger Cisneros, Attorneys for Defendant, 771 E. & C. Building, Denver 2, Colorado, CHerry 4-0728"

[fol. 454] In District Court of Denver County

Denial of Motion for a New Trial and to Set Aside Verdict—August 18, 1959

Mr. Vigil: Most of the points we have made in this matter have already been argued in full before the Court, but I do think some of these points should be emphasized.

The motion for change of venue, on that I will not spend any time, and the motion for severance was never really ruled upon, but I think it should properly have been granted.

The Court: I denied the motion for severance.

Mr. Vigil: We argued that at length, so there is nothing new in that.

Point 5, the Court's refusal to quash the information on the grounds that it did not state that the defendants should know the difference between good and evil, in view of the age of the younger defendant, and certainly the older one, it was a material part of the charge and should have been included because it is statutory and, of course, the district attorney's position was that all he had to argue was first degree murder.

Now, the next, Point 6, the information charged both of these boys with committing the crime of murder, and that in fact was a charge not based on any conspiracy, but a direct charge. If one was dismissed previously, the information had to be duplicitous based on the fact that both participated and that had to be established beyond all reasonable doubt.

I think we were entitled to waive the jury based on the [fol. 455] Colorado law. It was inconsistent that the jury had to determine between life imprisonment and death. In that case, it was our position that the defendant was entitled to waive the jury, because under all the cases in Colorado where there was such issue it was granted. We feel this was a point that was prejudicial to this defendant.

The next, Point 8, former jeopardy has been argued at length and I will not go into that.

Point 9, of course we were not given a preliminary hearing in this case and I think under the law a preliminary hearing is mandatory.

The next point, 10, is one we made our argument on in court and I think we were overruled and some statement was made to the jury to disregard the statement, but we never know what effect that might have, and that it also true of the closing statement where we objected when the district attorney stated in his closing argument that the hoodlums in Denver were awaiting the return of this jury's verdict. Of course, we realize the Court makes a general statement to the jury that the jury is not to take this argument as any part of the evidence, but it is still highly prejudicial because we never know what the jury may believe is the actual purpose in the trial, and we feel it was prejudicial.

Point 11 is highly important as to the appointment of three psychiatrists. The point here is not only that they were permitted to be endorsed, but that they were witnesses who were witnesses who examined both defendants at the request of the defendants themselves, and there was no plea [fol. 456] of insanity and they were not witnesses appointed by the Court based on any plea of insanity. They were witnesses supposedly to assist the defendants in deciding whether or not we should plead insanity and, of course, we felt it was wholly improper to permit them to be endorsed as witnesses.

Point 12 just follows the same ruling.

Point 13 is a point which came up during the trial where Dr. Pollay was recalled and I think it was improper for him to be recalled.

Point 14, I think this point is one that did not receive proper consideration.

Dr. Ogura testified that he had made this examination and concluded certain things as a result of his examination, but he stated further that in arriving at his conclusion he discussed his findings, or discussed the matter, by getting opinions of other doctors.

In the case of Carter vs. The People, 119 Colo. 342, in that case the testimony was from a doctor from the State Hospital, a psychiatrist, and his testimony in substance was to the effect that he had discussed with Dr. Ebaugh and some of the other doctors, and that they would do this frequently. In that case the Supreme Cort reversed the trial court and held that was hearsay and that the defendant was entitled to confront the witness. In this case we have a parallel situation, because Dr. Ogura stated that was what he did.

In any event, I think that in and of itself is sufficient grounds for granting a new trial.

[fol. 457] The next point is one we argued at some length, Point 15, which is regarding statements, alleged confessions.

Here we have a statement that involves signatures of three boys, one of them is an eight year-old, the other twelve, and this boy was fourten, and the statement, as was testified to here in Chambers, was a joint statement, and the prosecution witness stated he could not separate one state-

ment from the other in arriving at what one said or the other said.

We made the same objection as the trial developed. In this case the statement from the witness was to the effect that he could not separate one sentence from another, and that was the original statement, as the Court will recall. but in spite of that, when he testified we made the same objection based upon the fact that he himself had said he could not separate one statement from the other, and obviously he was using this statement against the other boys and the eight year-old was out of it and we were getting testimony here against this one boy that concerned all three of them. That in my opinion was wholly improper, even without regard to what the law is with reference to the charging in the Juvenile Court, which we raised obviously.

I think that was a very material point, because this witness, as the Court will recall, in his written statement no mention was made of any knife. He said this was an oral thing and he could not recall who said it.

In addition to that, there was never any statement on his part, nor on the part of any of them that they had in writing that the requirement that the defendants be told of their [fol. 458] constitutional rights except for one witness. The last witness testified he had told them about their constitutional rights.

In any event, the point is that this original statement should have been excluded because it certainly was not proper. Our position is that not only the original statement but the second statement, which was a joint statement, should have been excluded. I am aware of the fact that the statement by the eight year-old and the twelve year-old was used against the fourteen year-old.

(Colloquy of Court and counsel.)

Mr. Vigil: The argument we are making is on two points, —the oral statement, we held, was wholly improper and the basis of that was that there was a written statement which was made by all three of them. My contention is the Court had originally excluded the statement made by all three of them but when it was offered as an oral statement the Court permitted it and we made the same objection.

We feel that was wholly prejudicial and for that reason we should be granted a new trial.

The next; 16, is a fundamental point and I think is one that was not sufficiently considered, it is the motion we made to suppress the evidence on the grounds that the evidence had been used in the Juvenile Court. Under the laws of Colorado, and, of course, I do not know what that statute means if it does not mean that the evidence cannot be used. There are similar statutes in almost every state in the union. We went into that statute before. The district attorney did [fol. 459] not cite a single case. I should like to go over this very briefly, because it is a point which I think deserves much consideration and it is fundamental here because of the constitution.

This statute was apparently copied word for word from the Illinois statute, but there has been no determination where we could get some idea what the court thought of it. We do have a similar statute in New York and many of the southern states.

We had a case from New York in which the boy had been tried in the Juvenile Court and it was appealed, based on the fact he had not been given a proper hearing, that he was not advised of his constitutional rights in the Juvenile Court and that this statute prohibited giving him a trial of that nature.

(Argument and citation of authorities.)

The court says the language is very plain and, as I view it, this one in Colorado is even plainer and neither of these states permitted the district attorney to use the same evidence. In this case the district attorney said, in his argument, if this were to be withheld that this was in fact the only evidence they had.

(Argument of counsel and citation of authorities.)

The next point is almost the same, and then we objected, as the Court remembers, regarding any reference to the Juvenile Court's hearing before it and that never should have been referred to with reference to the fact hat they had been previously convicted in the Juvenile Cou t.

Mr. Rossman: That was brought out by the defendant.

[fol. 460] (Discussion off the record.)

Mr. Vigil: My only note is to the fact that each and every one of these points has been argued during the trial and that the motion raises no new points that the Court has not been informed on previously by the way of some argument at the time the matter came before the Court, and it seems to me it would be of no value to submit any further argument.

The Court: On this matter of the hearing in the Juvenile Court, we went into that at great length.

(Colloquy of the Court, Judge Gilliam, and counsel.)

The Court: I will deny the motion.

Mr. Vigil: Note our exception to the Court's ruling.

The Court: Is there any reason why sentence should not pass at this time?

Mr. Vigil: The only reasons are the ones we have argued.

The Court: Is there anything Bobby would like to say before I pass sentence?

Defendant: No, sir.

JUDGMENT AND SENTENCE

The Court: Robert Elmer Gallegos, it is the judgment and sentence of the Court that you shall be by the Sheriff of the City and County of Denver removed to the Common Jail of the City and County of Denver, and thence by the said Sheriff conveyed, with all convenient speed, to the State Penitentiary at Canon City, Colorado, there to be delivered to the warden or keeper thereof, to be by him kept and confined therein for the rest of your natural life.

The Court will order a stay of execution of ninety [fol. 461] days and if you need more time I will give it to you.

Mr. Vigil: I want to make an objection to the Court's sentencing Bobby Gallegos to the State penitentiary.

If the Court please, we would like to have at least ninety days in which to tender the record, and, furthermore, we would like to make a motion that the Court order that the appeal be at the expense of the State.

The Court: That motion is granted.

[fol. 462] IN DISTRICT COURT OF DENVER COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

Forasmuch as the above and foregoing contains all the evidence offered or introduced upon the trial of this cause, on the part of the People, as well as on the part of the defendants, and all the proceedings had and objections and motions made and interposed during the trial thereof, and the rulings and orders of the Court made thereon, and exceptions reserved thereto by the respective parties; and inasmuch as the same do not fully appear of record, the defendants respectfully tender this their Bill of Exceptions herein, and pray the trial Judge to approve, allow, settle, sign and seal the same, pursuant to the statute in such case made and provided; and which, when so approved, allowed, settled, signed and sealed, may become a part of the record herein.

And I, the undersigned, Judge before whom said cause was tried, do hereby approve, allow, settle, sign and seal the same as the Bill of Exceptions in said cause, and do certify that the same is full, complete and correct, and contains all the evidence introduced or offered on the trial of said cause, and the same is made a part of the record herein.

Done at the City and County of Denver, in said District, this 27th day of November, A. D. 1959.

H. Joe Rawlinson, Jr., Judge (Seal.)

Approved:

Bert M. Keating, District Attorney, by Melvin Rossman, Deputy.

Filed in the Supreme Court of the State of Colorado, December 31, 1959. George A. Trout, Clerk.

[fols. 463-570] IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO

Criminal Action No. 45708 Div. 8

THE PEOPLE OF THE STATE OF COLORADO

vs.

ROBERT ELMER GALLEGOS, (Edward Raymond Martinez)

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

I, H. Joe Rawlinson, Jr., Judge of the District Court of the City and County of Denver, Colorado, do hereby certify that as to all portions of the above and foregoing record in Case No. 45708, in said Court, entitled The People of the State of Colorado versus Robert Elmer Gallegos, not covered by the above and foregoing Certificate of said Court, the same is true and correct and that the same is full and complete and is hereby settled, signed and sealed as the complete record on error in said cause.

Witness, H. Joe Rawlinson, Jr. Judge of said Court, with the seal thereof hereunto affixed at his office in the City and County of Denver, State of Colorado, this 7th day of December, A. D. 1959.

H. Joe Rawlinson, Jr., Judge (Seal).

Filed in the Supreme Court of the State of Colorado, December 31, 1959. George A. Trout, Clerk.

[fol. 571] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19264

Error to the District Court of the City and County of Denver

Honorable H. Joe Rawlinson, Judge

ROBERT ELMER GALLEGOS, Plaintiff in Error,

v.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

EN BANC JUDGMENT AFFIRMED

Mr. Charles S. Vigil, Mr. Roger Cisneros, Attorneys for Plaintiff in Error.

Mr. Duke W. Dunbar, Attorney General, Mr. Frank E. Hickey, Deputy Attorney General, Mr. J. F. Bauer, Assistant Attorney General, Attorneys for Defendant in Error.

Mr. Justice Moore delivered the opinion of the Court.

OPINION—December 19, 1960

[fol. 572] Plaintiff in error, to whom we will refer as defendant, was found guilty of first degree murder and sentenced to imprisonment for life. He was charged jointly with one Edward Raymond Martinez. The information, in pertinent part, alleged that the defendant and said Martinez, "did feloniously, wilfully and of their premeditated malice aforethought kill and murder one Robert F. Smith; * * *."

Defendant was fourteen, Martinez was twelve, and the decedent Smith was "over seventy" years of age. The homicide was committed in connection with a robbery allegedly perpetrated by the defendant and Martinez upon the deceased. After the trial court ruled that a statement made by Martinez was not admissible in evidence the case as to him dismissed.

Counsel for defendant contend, among numerous other

assignments of error, that the information should be quashed for the following reasons:

"1. Two defendants are charged with doing the same act.
"2. No charge that death occurred within a year and a day.
"3. Age of the defendant not stated.
"4. No allegation that offense had occurred during robbery.
"5. No allegation that 14 year old defendant understood difference between good and evil."

[fol. 573] We know of no authority in this or any other jurisdiction which supports any of these contentions. Our attention is not directed to court decisions, to any statute, or to any comment of a text writer which in any respect upholds the position asserted by counsel for defendant. Numerous decisions of this court, and of other jurisdictions, clearly indicate that the information here sufficiently charged the crime for which defendant was convicted.

The evidence received at the trial established that between 8:30 and 9:00 P.M. on December 20, 1958, the defendant and two other boys were shining shoes in the neighborhood of 18th and Curtis streets in Denver. They were not making much money and together they thought of a plan to rob an old man. They followed the deceased to a hotel located at 1229-18th street. He entered the hotel and the defendant and one of the other boys followed him inside. The smallest boy (aged 8) stayed outside. The deceased was lost sight of by defendant and his companion and in an effort to locate him they told some of the inmates of the hotel that they were looking for their grandfather who had just come in, and inquired as to the room into which he had gone. An occupant of the room adjoining that of the deceased told the boys that the old man next door had just come in, and thereupon the boys knocked at the door. The boy with defendant asked Smith for a drink of water and when the old man brought it, he was grabbed and the defendant [fol. 574] the defendant struck him with a shoe brush. He was knocked to the floor, a knife was held to his throat, he was badly beaten, and his wallet containing $13.00 was taken. The perpetrators of the robbery then left the hotel; all three

of the boys ran to the 23rd street viaduct where the money was divided and the victim's billfold, and the shoe brush thrown from the bridge.

Smith was taken to the Denver General Hospital. He had a fractured jaw, a knife cut under his chin, and appeared "badly beaten about the face and head." At that time he was conscious. He became progressively worse and by December 24, 1958, had lost consciousness and remained so until his death on January 26, 1959. The medical experts who performed surgery and administered treatment in effort to save his life, testified that in their opinion the primary case of death was the brain injury suffered at the time of the robbery. Bronchial pneumonia was said to be a secondary cause of death because in the absence of the brain injury the deceased would have been able to handle the "secretions" which caused the pneumonia.

On the evening of January 1, 1959, defendant and two of his younger brothers were seen by an officer who had been assigned to investigate the robbery of Smith. The officer placed the boys in his automobile where he questioned them. Richard, aged 8, admitted that he and the defendant had a part in the assault upon Smith, and defendant admitted at that time that he had taken part in the robbery. Both boys then told the officer that the third boy, Charles, was not a [fol. 575] party to the offense. They said that the boy who was with them when Smith was robbed was their cousin, Edward Raymond Martinez. The officer then took Charles home. Richard and the defendant were placed in Juvenile Hall. The following day the same officer talked again with defendant who told in detail how he, Richard, and the Martinez boy had followed the "old man" to the hotel; how Richard had "stayed downstairs and watched for cops"; how they lost sight of their "old man" and asked some people if they had seen their grandfather; how they were directed to the room occupied by Smith and how they entered his room and robbed him.

The officer's testimony concerning the statement made by Robert on the day following his arrest included, inter alia, the following:

> "* * * He said upon knocking on the door someone told him to come in, that he opened the door and he seen it was the man he was looking for. He said at that

time Eddie Martinez asked the old man for a drink of water and when the old man brought the water, Eddie grabbed him and he, Robert, hit the old man about the head and face with a shoe brush; that when the old man fell to the floor he took a knife and held it at the old man's throat and took his billfold out of his back pocket."

January 7, 1959, defendant was taken from Juvenile Hall to police headquarters where he was questioned in the presence of a stenographer before whom questions were [fol. 576] asked and answers given. He was then returned to Juvenile Hall. The typewritten questions and answers were thereafter taken to Juvenile Hall where defendant read them aloud to his eight year old brother Richard, and his cousin (the Martinez boy). The statement was signed by defendant and the Martinez boy.

Following a hearing out of the presence of the jury the court ruled that the statement as related to defendant was competent. It was not actually placed before the jury but the pertinent statements made by defendant were read into the record as follows:

"Questioning directed by Sergeant C. W. Miller to Robert Gallegos:

"Q. What is your name?
"A. Robert Gallegos.
"Q. How old are you?
"A. 14.
"Q. When were you born?
"A. 1944.
"Q. Give me the complete birth date?
"A. 1944, March 25th.
"Q. Where do you live?
"A. 2654 Stout.

"Q. All right, at this time, Robert, I call your attention to Case No. 290463, wherein one Robert F. Smith of 1229-18th Street, City and County of Denver, Colorado, was the victim of an aggravated robbery. This [fol. 577] robbery offense took place in Apartment No. 45, at 1229-18th Street. This said offense occurred between 8:30 p.m. December 20, 1958, and 9:00 p.m.

December 20, 1958. Now, I'll ask you, Robert, if you know anything about this assault and robbery. Just tell me in your own words.

"A. All of us three was shining shoes, and we wasn't making much money, and when we were coming Eddie thought of getting the old man's money.

"Q. You three were shining shoes and not making too much money, is that correct, and you say Eddie Martinez thought of a plan to rob an old man, is that correct?

"A. Yes. Then we saw this man. He was sort of a drunk. We thought he had some money, so we followed him up to this room.

"Q. You followed him to his hotel room?

"A. Yes.

"Q. That was 1229-18th Street, Apartment 45?

"A. Yes. When we went inside, we knocked on the door.

"Q. Who is 'we'?

"A. Me and Eddie. And we said 'Can we have a glass of water?', and as soon as he went to get the water, Eddie grabbed him, and I hit him.

"Q. What did you hit him with?

"A. I had a suede brush.

[fol. 578] "Q. Suede shoe shining brush?

"A. Yes. Then he hit the bed, then fell to the floor. We took his money, his wallet, in his back pocket. As soon as we took the money, Eddie said 'Let's cut out'. We ran down stairs and down by the bridge, so we split it up three ways. I got $3.

"Q. You say you split this money up down by a bridge?

"A. 23rd bridge.

"Q. The 23rd Street viaduct, is that right?

"A. Yes.

"Q. Where was Richard during this assault?

"A. Downstairs.

"Q. Why was he downstairs?

"A. Watching if any cops come.

"Q. He was serving as a lookout?

"A. Yes."

The signature of Robert Elmer Gallegos appears on page 5. The following also appears:

> "I certify I have read the above statement and have signed it and the signature thereon is mine and this statement is entirely true. The statement was made voluntarily after I was duly warned by Sergeant Miller that it could and may be used against me in court. There were no promises made to me or threats made against me in obtaining this statement."
>
> "The signature of Robert Elmer Gallegos then appears in writing."

[fol. 579] Counsel for defendant objected to the admission of the oral and written confessions on the ground that they were not voluntary, and upon the further ground that the use of said confessions was prohibited by the terms of C.R.S. '53, 22-8-1(3). As related to this statute, hereinafter considered, it is pertinent to point out that prior to the death of Smith defendant was sentenced to the Industrial School in proceedings in delinquency filed in the juvenile court based on the robbery of Smith.

Defendant did not testify at the trial of the case except for his appearance in the absence of the jury in proceedings before the trial judge in which the court considered the question of whether the confessions were voluntary. Defendant there testified that he signed his name to the written confession "because he (the detective) said whether we told the truth or didn't tell the truth he was going to send us to the Industrial School." The following is taken from the transcript of defendant's testimony:

> "The Court: Did he threaten you?
>
> "The Witness: No, sir.
>
> "Q. Did he just ask the questions and you have the answers?
>
> "A. Yes, sir.
>
> "Q. He didn't threaten you in any way?
>
> "A. No, sir.
>
> [fol. 580] "Q. Did he beat you in any way?
>
> "A. No, sir.

"Q. And he just asked the questions and you gave the answers?

"A. Yes, sir.

* * * * *

"Q. These answers right here (indicating) Exhibit D, that you gave Detective Miller, what was the reason you gave those answers?

"A. I was scared that if we didn't do it they would keep us in security longer.

"Q. How long had you been in security then?

"A. Five days.

"Q. You had been in security five days. While you are in security you are kept in solitary confinment, is that right?

"A. Yes.

"Q. And you were afraid of that?

"A. Yes, sir.

"Mr. Virgil: That is all."

Defendant admitted, however, that he was not told by any investigating officer that they intended to keep him "in security."

We first consider the objections to the admission of evidence based upon the provisions of C.R.S. '53, 22-8-1 (3), which in pertinent part reads as follows:

> [fol. 581] "A disposition of any child under this article, or any evidence given in any such case, shall not in any criminal or other cause or proceeding whatever be lawful or proper evidence against such child for any purpose excepting in subsequent cases against the same child under this article. * * *"

It is undisputed that in the delinquency proceedings disposed of in the juvenile court the same evidence was offered to establish the robbery committed by defendant upon the person of the deceased which was presented in connection with the prosecution for murder. The position of counsel for defendant is that the statute above quoted prevents the introduction of any evidence in the murder case which also formed the basis of testimony considered in the juvenile

court. This question was raised in numerous ways but no good purpose would be served by referring specifically to the different approaches under which the issue is presented.

We are unable to agree with the contention of counsel for defendant. It is asserted that because of the language of the statute above quoted:

> "The District Court could not have considered the same evidence in the murder trial that was presented in the Juvenile Court. No Colorado cases have specifically considered this point. But the statute seems so clear that we are at a loss to see how the District Attorney or the Trial Court could have failed to read it to foreclose the District Attorney in using the same evidence [fol. 582] in the District Court that had already been used in the Juvenile Court. * * * The same statute appears in Illinois and many other states but no case directly in point has been found; probably because the statute is so clear that no other construction is available, and also, the view of the courts has been, elsewhere at least, that we must guide and protect minor children and that is the reason for such statutes."

Contrary to the contention of counsel we hold the statute to mean that a transcript of the testimony given by any witness, including the defendant, in a proceeding before the juvenile court cannot be used in any manner in a subsequent action against the child alleged to be a delinquent in the juvenile proceeding. Nor can any evidence be admitted as to what a witness said in the juvenile court hearing. There is nothing in the statute to prevent the district attorney from establishing the same facts by the same witnesses and by the same real and documentary evidence that may have been used in the earlier proceeding in the juvenile court. It is only the evidence *as introduced at the hearing in the juvenile court* which cannot be used against said child in subsequent court proceedings. *Ex Parte Walters*, 92 Okla. Cr. 1, 221 P. (2d) 659.

The reasons for the statute are well stated in *Commonwealth* v. *Myers*, 393 Pa. 224, 144 A.(2d) 367, and in Volume [fol. 583] 3, Wigmore on Evidence, section 1040. As there stated, these reasons are consistent with the interpretation we give the statute and inconsistent with the contention of

counsel for defendant. It is not the purpose of the statute to foreclose from all future revelation the facts relating to conduct which formed the basis of a prior delinquency proceeding in the juvenile court. When oral testimony is offered for its intrinsic value with relation to the issue to be tried—rather than to establish what was said or done in proceedings before the juvenile court—the statute does not prevent the giving of testimony because the same witness was previously called upon to give evidence relating to the same transaction in juvenile court proceedings. For a comparable example involving the federal rule which prevents disclosure of proceedings before a grand jury, see *United States* v. *Interstate Dress Carriers, Inc.*, U. S. C. C. 2nd Circuit, 280 Fed.(2d) 52.

We next consider the assignments of error based upon the broad ground that the trial court erred in admitting the confessions made by defendant. These assignments relate to the asserted inability of a fourteen year old boy to make a voluntary confession; to the asserted failure of the arresting officer to warn him that any statement he might make could be used against him; to the fear of the defendant that he would be kept "in security" unless he signed the confession of January 7th; to the admitted fact that defendant was not provided with the advice of an attorney or his [fol. 584] parents; and that the confessions of defendant were not corroborated by other evidence, and standing alone were not sufficient to sustain a conviction.

We think it a sufficient answer to these contentions to direct attention to the following excerpts from opinions of this court:

> "The mere fact that the confession was elicited by questions, is not sufficient to render it inadmissible. The questions were not of a character, or propounded under circumstances and in a manner either to coerce or persuade. * * *
>
> "* * * We do not understand that it is the duty of a police officer to caution a prisoner as to the consequences of making a statement which is voluntary, but merely to refrain from inducing him to make one. * * *" *Regan* v. *People*, 49 Colo. 316, 112 Pac. 785.
>
> "This court, on repeated occasions, has said that, to be admissible, a confession must be voluntary, and that

the question of admissibility is for the court. (Citing numerous cases) * * * The jury, of course, is not permitted to pass upon the question of admissibility. The court having admitted the confession in evidence, it is for the jury to determine the weight to which it is entitled. The jury may accord to it great weight, little weight, or no weight at all, depending upon the circumstances surrounding the making of the confession. * * *". *Osborn* v. *People*, 83 Colo. 4, 262 Pac. 892.

[fol. 585] "If it be true that the fundamental ground of the rule against receiving confessions induced by threats or promises is that the credibility of the confession is destroyed, then the test should be whether the inducement was sufficient to persuade one like the accused to confess falsely. * * *" *Buschy* v. *People*, 73 Colo. 472, 216 Pac. 519.

From 20 Amer. Jur. 447, we quote the following:

> "A confession is not inadmissible merely because the person making it is a minor if he is of such age and intelligence as to understand the nature and consequences of his confession, but his age in connection with other facts may render his confession inadmissible. In the absence of a statute providing otherwise, the voluntary confession of an infant fourteen years of age is prima facie admissible in evidence against him upon the trial. The same rule will be applied to a confession by an infant under fourteen if he is capable of committing a crime, for the reason that if he has such mental capacity as to render him amenable to the law for the commission of a crime, he has sufficient mental capacity to make a confession of guilt. * * *"

We cannot say as a matter of law that the court committed error in admitting the oral and written confessions of defendant. The jurors were properly instructed with reference to their right to accord such weight thereto as all the facts and circumstances indicated to them to be proper.

[fol. 586] We have considered all the other assignments of error made by counsel for defendant and find them to

be without merit. They involve no new legal problem and it would only lengthen this opinion to mention them in greater detail, and to do so would not add to or qualify legal principles which are already well established in the law.

Much of what has been argued in this court might carry substantial weight if presented in connection with an application to the Governor for commutation of sentence or other relief by way of executive clemency. It is not the function of this court to reverse a judgment entered in a criminal case following a trial conducted, in all material respects, in harmony with the legal principles applicable thereto, even though as a result of said trial a fourteen year old boy is sentenced to imprisonment for life. The defendant had a fair trial under the applicable legal principles. It is our duty to affirm the judgment, and it accordingly is affirmed.

[fol. 587] IN THE SUPREME COURT OF THE STATE OF COLORADO

19264

Error to the District Court City and County of Denver

ROBERT ELMER GALLEGOS, Plaintiff in Error

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

JUDGMENT—December 19, 1960

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment

of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

By the Court. En Banc. December 19, 1960.

[fol. 588] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19264

Error to the District Court in and for the City and County of Denver and State of Colorado

Honorable H. Joe Rawlinson, Judge

ROBERT ELMER GALLEGOS, Plaintiff in Error

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

PETITION FOR A REHEARING AND STAY OF EXECUTION—Filed December 27, 1960

Comes now the plaintiff in error and moves that this Honorable Court grant a rehearing because:

1. A. The statement of this Honorable Court that a transcript of the testimony given by any witness including the defendant in a proceeding before the juvenile court cannot be used in any manner in a subsequent action against the child alleged to be a delinquent seems to cover the situation here. Exhibits A, B, C, and D were the basis for the conviction in the juvenile court on the charge of robbery. These exhibits, A, B, C, and D, were again used by the district attorney in District Court. The fact that it was only part of the evidence in the District Court does not change the situation.

The difference in a Federal grand jury proceeding and the juvenile court proceeding is apparent. The grand jury is merely an investigative body whereas juvenile court procedure is a trial where punishment follows the receipt of the testimony and the boy here was punished. See hearing on plea of former jeopardy, 28th of April, 1959 ff. 35-1 to 35-49. Also see ff. 67-126: Particularly the answers of officer Chism where he states: "I read my report and it is more or less the same information." Also, he answered the question, "Can you pick out one line and say which boy told you that?" Answer: "I don't believe I could pick it out." And the question, "You are going to present exactly the same information?" Answer: "I believe so."

[fol. 589] B. As to former jeopardy, the same evidence was used in the murder trial and the dismissal of the cases to Edward Martinez, all other factors being the same would seem to dismiss it as to Robert Gallegos. *Davis* v. *Peo.* 22 Colo. 1, 43 Pac. 122.

2. The Attorney General states erroneously (page 5 of his brief) and this Honorable Court did not comment thereon, that "There is no merit to defendant's objection to the testimony of the three court-appointed psychiatrists since they never appeared before either the Court or the jury."

This is a false statement since the testimony of psychiatrists was given. This testimony and the reasons therefor and the objections of the defense appear: Dr. Charles Rymer, ff. 147-149; Dr. R. Robert Cohen, f. 152.

The doctors were appointed to assist trial defense counsel. *Not under a plea of insanity.* Not for the purpose of assisting the prosecution. They were appointed for indigent boys in a special request not under any statute, (ff. 144-146) and for this reason we believe this was improper.

3. Legal interpretation, here, because a child is involved, obligates the child to serve in two separate institutions. Can fair play permit such an interpretation?

4. We humbly offer as to the sufficiency of the information: (a) Two defendants are charged with doing the same act. *State* v. *Roberts*, 95 Kan. 280, 147 Pac. 828. (b) No charge that death occurred within a year and a day. *Ball* v. *U. S.*, 140 U.S. 118, 11 S. Ct. 1161, 35 L. Ed. 377. (c) Age of defendants not stated and no allegation that 14-year

old defendant understood difference between good and evil. 40-1-3 C.R.S. 1953 provides:

> "... and who has arrived at the age of fourteen years or before that age if such person knows the difference between good or evil."

(d) No allegation the offence had occurred during robbery. 40-2-3 C.R.S. 1953 provides:

> "All murder ... perpetrated ... any ... robbery ... shall be deemed murder of the first degree ...".

It is our contention that the robbery must be pleaded as part of the charge. See also *State* v. *Belyea*, 9 N.D. 353, 83 N.W. 1.

[fol. 590] 5. The denial of new trial based upon the above allegations together with the 37 assignments of error, constitutes a deprivation of due process of Robert Elmer Gallegos, whose intelligence was subnormal, the testimony of Dr. Chester D. Poremba (ff. 277-288) show that this Spanish-speaking boy had an I. Q. of 70 and was of the mental age of 8 and spoke the language of a child of 8, and was in a low range of intelligence and was a follower. The statements, A, B, C, and D, were taken without notice to the guardian (ff. 67-124). The child here is a ward of the Court. The Court must exercise fair play and protection towards this infant.

> See *Whitten* v. *State*, 82 Fla. 181, 89 So. 421, *State* v. *Vineyard*, 81 W.Va. 98, 93 S.E. 1034, *Allen* v. *U. S.* 150 U.S. 435, 2C L.Ed. 580, *Angelo* v. *Peo.* 96 Ill. 209, 36 Am. Rep. 122, *Ex parte Hightower* 13 Okl. Cr. 472, 165 Pac. 624, *In re Powell* 6 Okl. Cr. 495, 120 Pac. 1022

Wherefore, Robert Elmer Gallegos respectfully requests a rehearing in this matter and further requests that oral argument be granted for the purpose of pointing out what we consider salient points. If the petition for a rehearing is denied, we respectfully ask that a stay of execution be granted to permit time for action in the appropriate United States court and in the United States Supreme Court.

Respectfully submitted, /s/ Charles S. Vigil. /s/ Robert Cisneros, Attorneys for Plaintiff in Error.

[fol. 591] IN THE SUPREME COURT OF THE STATE OF COLORADO

19264

Error to the District Court, City and County of Denver

ROBERT ELMER GALLEGOS, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

ORDER DENYING PETITION FOR REHEARING AND GRANTING STAY OF EXECUTION—January 9, 1961

The court having considered the motion of the plaintiff in error for rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.

It is further ordered that issuance of remittitur herein be stayed for a period of ninety days from this time and that all further proceedings in the District Court of the City and County of Denver be stayed during such period of time.

By the Court. En Banc.

[fol. 592] IN THE SUPREME COURT OF THE STATE OF COLORADO

19264

Error to the District Court of the City and County of Denver

ROBERT ELMER GALLEGOS, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

ORDER TO CERTIFY RECORD TO THE SUPREME COURT—March 9, 1961

On consideration of the motion of the plantiff in error requesting the clerk of this court to prepare and certify to the United States Supreme Court a record of the proceed-

ings herein without payment of costs, it is ordered that plaintiff in error may withdraw and use the record on error filed herein on condition that the same be returned to this court upon termination of proceedings in the United States Supreme Court.

By the Court. En Banc.

[File endorsement omitted.]

[fol. 593] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 594] IN THE SUPREME COURT OF THE STATE OF COLORADO

19264

Error to the District Court, City and County of Denver

ROBERT ELMER GALLEGOS, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, Defendant in Error

ORDER STAYING EXECUTION OF JUDGMENT—April 20, 1961.

Upon consideration of the motion of the plaintiff in error, it is this day ordered that execution of the judgment of the district court of the City and County of Denver herein be, and the same hereby is, stayed until final action by the Supreme Court of the United States.

By the Court. En Banc.

[File endorsement omitted.]

[fol. 595] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 41 Misc.

ROBERT ELMER GALLEGOS, Petitioner,

vs.

COLORADO

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 9, 1961.

On Petition For Writ of Certiorari to the Supreme Court of the State of Colorado.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 475.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 475

ROBERT ELMER GALLEGOS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF COLORADO,

Respondents.

BRIEF OF PETITIONER

CHARLES S. VIGIL,
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1961

No. 475

ROBERT ELMER GALLEGOS,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF COLORADO,

Respondents.

BRIEF OF PETITIONER

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I. Opinion Below

The Supreme Court of the State of Colorado denied petitioner's appeal and also denied the application for a rehearing without written opinion. The opinion of the Supreme Court appears at page 314 of the Record and the denial of the petition for rehearing appears at page 328 of the Record.

II. Jurisdiction

1. The judgment of the Supreme Court of Colorado denying the appeal was entered on December 19, 1960.

2. Timely petition for a rehearing was filed which was denied on January 9, 1961, and execution was stayed for 90 days.

3. The Supreme Court of Colorado is the highest court in Colorado and jurisdiction of this court is invoked by reason of 28 U.S.C. Sec. 1257 (3).

III. Questions Presented for Review

1. Where in a criminal proceeding a Spanish-speaking child of the age of 14 is held in solitary confinement for a period of five days and is denied the right to counsel and is denied the right to visitation by his parents and is questioned repeatedly, and where the child is of the mental age of eight years, may the state court properly claim that this 14-year-old child's statement, which is the only basis for a conviction in the state's court, is a voluntary statement?

2. Can a state court deny an indigent defendant the same rights and privileges in securing psychiatrists to examine and testify in his behalf as a person of means might have in the same situation?

3. May the state court construe a statute that provides as follows: "a disposition of any child under this article or any evidence given in such case, shall not in any criminal or other cause or proceeding whatever be lawful or proper evidence against such child for any purpose . . ." to mean that the evidence can be used against such child and to state that the only evidence restricted in use is that that was introduced in the hearing in the Juvenile Court and using as an analogy the rule in the federal courts that provides that the testimony given before a grand jury can be again used in a trial of the defendant involved?

4. Can the trial court and the Supreme Court of the State of Colorado deny a person the right to waive a jury trial when there is no death penalty involved?

IV. Constitutional Provisions Involved

Article XIV, Constitution of the United States: "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

V. Statement of Facts

A. Synopsis of Facts

Eddie Martinez, 12, and Robert Gallegos, 14, were charged with murder occurring during robbery. On former jeopardy hearing evidence of action No. 25781 in the Juvenile Court, Juvenile Judge Gilliam, admitted that the statements, questions and answers had been used in his Court. Original statement secured by officers from eight-year-old Richard. Subsequently other statements were taken by questioning all three boys. Statement which is basis of conviction, and only evidence presented in the Juvenile Court on robbery charge; and in District Court on the murder charge was to the effect that the three boys followed a man named Smith and they noticed he was weaving on the street. The eight-year-old was downstairs as a lookout. Edward Martinez, 12, grabbed the old man as he went to get a drink of water, and Robert Gallegos struck him with a shoe shine brush. They took $13.00 on December 20, 1958. Approximately 30 days later Smith died. Death certificate indicates he died from pneumonia. Both boys were committed to the State Industrial School for indeterminate term by Juvenile Court.

Verdicts submitted on first degree murder and not guilty in District Court. Jury verdict of guilty. Edward Martinez

dismissed by District Court because of his inability to understand oath. Robert Gallegos is under (1) life sentence, Penitentiary, and (2) indeterminate term, Industrial School.

B. Abstractions

Robert Elmer Gallegos, age 14, charged with murder occurring during alleged robbery January 30, 1959 (R. 4). Thereafter hearing defendant's plea of former jeopardy (R. 18), disclosing that defendant had previously been tried in the Juvenile Court on charge of robbery. Sentenced by the Juvenile Judge to State Industrial School. Gallegos had no representation (R. 23). Court denied plea of former jeopardy (R. 19-35, inc.).

Robert Gallegos was held in security in the Juvenile Hall for a period of five days. Miller stated solitary confinement room contained a microphone for the purpose of getting information (R. 143).

Gallegos was questioned on January 2, and formal statement was taken on January 7, in the morning (R. 146).

Witness Miller was asked whether he had explained to Robert what Case No. 290463 meant when Gallegos was questioned and he stated, "In my mind I knew they knew what I was talking about" (R. 148).

Robert Gallegos said when Detective Chism picked him up he thought Detective was going to take away his shoe shine box. He said Detective Chism talked to him first and said that he, Gallegos, had beat up some old man. "I told him I didn't know nothing about it. He told me Richard said we had done it and then he started telling me here how Richard lied and we was old enough to know better" (R. 156).

"While I was in Juvenile Hall I was kept in security. It is a room where you stay alone. I was in this room alone for five days. They only let me talk to the police officers. It was the only time I could come out of security. I never heard anyone tell me I could have a lawyer. No one ever told me I could talk to my parents and I was not permitted to talk to a lawyer or my parents. I was questioned three times while I was in security. When I was taken to the police building there were a lot of policemen there. They brought me from the Industrial School at Golden. I had been there 15 days and I am still under a sentence there (R. 158, 159). I have never seen Mr. Kruhd before he came to Juvenile Hall (R. 161). I signed the statement because Detective Chism stated whether we told the truth or didn't tell the truth, he was going to send us to the Industrial School (R. 163). As soon as statement signed by me I was released from security" (R. 165).

Gallegos emphasized that statements made by Eddie Martinez were untrue (R. 163). Robert regarding the statement of January 7, 1959, "*Yes, sir, I signed it because he said whether we told the truth or didn't tell the truth he was going to send us to the Industrial School*" (R. 163).

> "Q. These answers right here (indicating Exhibit D) that you gave Detective Miller. What was the reason you gave those answers? A. (Robert Gallegos) *I was scared that if we didn't do it they would keep us in security longer*" (R. 164).

Eyewitness, James Clayton Harper, stated he could not positively identify Robert Gallegos as being present at the hotel at all (R. 83).

Police officer K. Wayne Weston (now in Colorado penitentiary), testified as to his making one of the offense reports (R. 30).

Italics ours unless noted.

Police witness, Paul O. Chism: The statements marked as People's Exhibits 1, 2, 3, and 4 were partially based on statements made by Richard Gallegos, age eight (R. 28).

Chism testified Exhibits A, B, and C were combined information from all three boys, one of whom was eight years of age (R. 124). Nothing was said to the boys with regard to fact statements had to be voluntary and that they could talk to their parents or a lawyer. First statement was secured from the eight-year-old boy, Richard Gallegos; his brother, Robert Gallegos, sat there and later verified the statement made by Richard Gallegos. Then all the boys were taken to Juvenile Hall and placed in solitary (R. 124, 125).

Mr. Rossman, Deputy District Attorney, stated that he did not believe that witness, Paul O. Chism, was competent to testify (R. 128) with relation to the People's Exhibits A, B, C, or D. In none of exhibits is there anything relating to a knife although Chism testified as to a knife, but nothing was written into statements concerning a knife (R. 130).

Paul O. Chism: Nothing was said to Robert Gallegos regarding the voluntariness of statements and the offense was not considered serious at the time of taking the statements (R. 131-132).

Chism secured the shoe shine brush which was admitted as People's Exhibit E by going to Robert Gallegos' mother, asking for the shoe shine kit which he took to Juvenile Hall and *Eddie Martinez identified it as being the brush that he, Eddie Martinez, struck Mr. Kruhd with* (R. 133). The boys were picked up New Year's night (R. 134).

Police witness, Charles W. Miller, testified he discussed the matter with Richard Gallegos, age eight. There was a monitor (microphone) in each room. After securing statement D, Miller gave the typed statement to Detective

Chism and Detective Riggs to take to the boys to be signed; although Detective Miller signed statement where the other witnesses signed, Miller stated that he signed only as a witness to statement (R. 140, 141).

Miller did not know how long Robert was held in solitary and the boys had been arrested on January 1st and the statement was secured on January 7th. He had interrogated one of the boys on the evening of January 3rd (R. 143). Miller stated Richard Gallegos went back to the room and Miller listened over microphone and then took the statement from all three boys (R. 144). Detective Chism also questioned the boys (R. 145). When Miller talked to Richard Gallegos, he did not tell him that he did not have to say anything or that he could have a lawyer or call his parents, but merely asked him what Richard wanted to tell him (R. 147, 148).

Miller stated that solitary means being kept in a room alone; defendants gave him no indication they wanted a lawyer. Police took Gallegos to the police station to take the final statement (R. 211, 212).

Defense made motion that all of the matters in the statement referring to the robbery be stricken for the reason that Gallegos had been sentenced to the Industrial School on that charge (R. 193). Motion denied.

People's Exhibit E, the shoe shine brush, was introduced over objection that shoe brush was taken from the home of Robert Gallegos and was not the shoe brush that was used in the alleged attack by Gallegos on Smith, but was a shoe brush that was given to Detective Chism by the mother of Robert Gallegos (R. 219).

Chism stated they held Robert Gallegos in solitary (security) by rules of Juvenile Hall and Chism did not have anything to do with that (R. 203). Security is where

a boy cannot talk to anybody, cannot see anybody. Chism did not tell Robert Gallegos that he could have a lawyer. Chism took a combined statement from all the boys (R. 204, 205).

Richard Gallegos was about eight years old (R. 206).

Maria Lucy Gallegos: She has 13 children. Lives in a six-room house and children all live at home. Mother of Bobby (Robert) Gallegos; his real name was Enselmo, but they call him Elmer. Robert is the oldest of the boys and there are two older girls. She went to see her son on the second of January and when she got there they told her she could not see Robert because he was under investigation. She could not see him until the following Thursday and they let her see Robert on the following Thursday. "I was told Robert was in Juvenile Hall about 11:30 at night on January 1st and I was not permitted to see him on the 2nd of January, 1959, when I went to see him" (R. 222-225).

Chester D. Poremba, court psychologist testified (R. 263): Robert Gallegos has an IQ of 70 on a verbal scale. He speaks the language of a child you might expect at eight or nine. He has a general IQ of 83. This put him in the low range of intelligence. "I would say he is probably functioning at the level one might expect of a normal child of 11, maybe 10" (R. 265, 266).

"I feel that he might make statements to attract attention. I feel that his being confined might have an effect on his making statements and would have the effect of his complying with whatever was requested of him (R. 266). It is possible that he did make a statement to gain attention or to please someone because he had been kept confined" (R. 271).

Melvin F. Hull, superintendent of Juvenile Hall: does not use the term "security" but "we isolate them from the

group." He cooperates with the police department in doing this. Robert Gallegos had never been any kind of problem while he was with Juvenile Hall (R. 271, 272, 273). The record also shows that the matter of a Spanish-speaking boy who had an IQ of 70 was called to the attention of the Court in the Motion and Petition for a rehearing (R. 327).

2. The defense objected to the psychiatrists testifying for any purpose for the reason that the psychiatrists had been appointed upon request of the defense to assist them to prepare for trial. Objection was: If Robert Gallegos had been financially able to pay for a psychiatrist the relationship of doctor and patient would exist. The doctor, therefore, could not be called to testify as to any matter concerning Robert Gallegos (R. 168, 169). Objection was overruled by the Court (R. 169). Dr. Charles A. Rymer and Dr. R. Robert Cohen testified concerning the defendants and indicated that they had examined both Robert Gallegos and Eddie Martinez (R. 170-174).

Petition for appointment of psychiatrists indicates that psychiatrists were appointed prior to entering a plea in order to assist counsel on mental condition of Robert Gallegos (R. 10). The Order (R. 11).

One of the psychiatrists, Dr. L. V. Tepley, reported to the trial court that Robert was not capable of choosing the right and refraining from doing the wrong (R. 14).

The defendant objected to the endorsement of the doctor witnesses for the reason that they were appointed upon the request of the defendant because he was unable to hire psychiatrists or doctors (R. 69).

> "The Court: I will rule the State may call the three psychiatrists on this question; do they know the difference between good and evil" (R. 176).

3. The Court granted the defendants' motion to suppress the statements as to one defendant only and overruled the motion to suppress as to Robert Gallegos (R. 49).

This motion among other points was based on:

C.R.S. '53 22-8-1 (3): "A disposition of any child or any evidence given in any such case, shall not in any criminal or other cause or proceeding whatever be lawful or proper evidence against such child . . ." (R. 47 and 320). Overruled as to Robert Gallegos (R. 49).

4. Defendant further filed motion to waive jury and the Court denied this motion (R. 37).

VI. Summary of Argument

The record amply shows a child, 14, held incommunicado five days, of subnormal intelligence, questioned at least three times, denied visit of his mother, not advised of right to counsel; at the end of that time gives a statement to the police after being put in fear "of being held in security longer" violates the sense of fair play inherent in the Constitution of the United States.

Coupled with that the use by the State of the testimony of psychiatrists appointed to assist the defendant before a plea was *even entered*, does not give Bobby Gallegos the equal protection of the laws contemplated.

Add that the trial court as well as the Supreme Court held that the same witnesses giving the same evidence may be called to convict a juvenile in a separate trial, though it seems clear that if this were a case involving a grown up in Colorado only one penalty would be assessed, and the law in Colorado as well as in most jurisdictions seems to prohibit the use of the same statement and evidence in

another Court as was used in the Juvenile Court, therefore the juvenile is denied the equal protection of the law if his rights are not thus guaranteed.

Finally the waiver of the jury was not permitted although in this case no degrees of murder nor the death penalty could be involved; and yet even this right was denied.

In summary it appears that ample reasons exist for reversal.

VII. ARGUMENT

A. Basic Constitutional Rights Were Violated in Colorado When a Child, 14, of Subnormal Intelligence Was Held Incommunicado to Secure Statement

In denying petitioner's appeal, the Colorado Supreme Court appears to have decided issues involving petitioner's rights under the Federal Constitution contrary to the decisions of the United States Supreme Court.

As to the question one, the matter of holding this 14-year-old boy in solitary confinement for a period of five days and until the written statement was secured, particularly in view of the fact that this 14-year-old boy was of the mental age of eight and did not have the benefit of counsel and was a Spanish-speaking child who was not warned that any statements made could be used against him; who was also afraid that they would keep him in "security" if he did not make the statement, was wrong, and the statement so secured was improperly admitted.

An early case on this is *Ziang Sung Wan, Petitioner*, v. *United States of America*, 266 Supreme Court 1, 69 L. Ed. 131. (Confession secured by continuous examination is inadmissible.) Following this *Perrygo* v. *United States*, 2

F. 2d 181, reversal of judgment on erroneous admission of confession of 17-year-old of low mentality.

To hold this 14-year-old boy in solitary confinement for five days, and not permitting his parents to see him, together with the interrogation that was repeated at least three times, seems to make mental coercion especially since the boy, Robert, has such a low mentality.

Cases have held that mental coercion will render a statement or confession inadmissible.

Brown v. *Mississippi*, 287 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461;
Ashcraft v. *Tennessee*, 327 U. S. 274, 90 L. Ed. 667, 66 S. Ct. 544;
Watts v. *Indiana*, 338 U. S. 49, 93 L. Ed. 1801, 69 S. Ct. 1347.

Confessions must be voluntary.

Stein v. *New York*, 346 U. S. 156, 98 L. Ed. 362, 74 S. Ct. 13.

Illegal detention may result in declaring confession involuntary.

Watson v. *United States*, 234 F. 2d 42 (App. D.C. 1956);
McNabb v. *United States*, 318 U. S. 332, 87 L. Ed. 819, 83 S. Ct. 608.

If there is a reasonable doubt that a confession is voluntary, doubt should be resolved in favor of accused.

State v. *Graffan*, 202 La. 869, 13 So. 2d 249.

Confessions under promises of any hope, benefit or favor made or held out by officers, or persons in authority are not voluntary.

Martin v. *United States*, 166 F. 2d 76 (C.C.A. 4th 1948);

Anderson v. *United States*, 124 F. 2d 58 (C.C.A. 6th 1941);

See also *Harling* v. *U. S.*, July 6, 1961, 295 F. 2d 161, C.A.D.C. on other points.

In *Culombe* v. *Connecticut* the Court once more reviewed a state court's determination that a criminal defendant's confession was admissible in evidence and found error. Culombe, an adult of subnormal intelligence, fell under the suspicion of state police officers in connection with a series of holdups and killings. He was taken into custody and questioned intermittently for a five-day period, at the end of which he confessed to the crimes in question. At no time during his detention was he subjected to physical brutality or the threat thereof, the periods of interrogation were not protracted, and he was not deprived of food or sleep. But his request for counsel was denied, he was evidently *not warned of his constitutional right to remain silent*, and he *was held incommunicado*, except when his wife and one of his children were brought before him for the express purpose of inducing him to confess. *His arrest on suspicion of serious felonies was not promptly followed, as state law required, by arraignment* before a magistrate; and when three days later he was finally arraigned he was charged only with breach of the peace, in a proceeding so perfunctory that he had no opportunity to speak to the judge. At his trial his police interrogators admitted that their conduct had been aimed at procuring a confession, and that the breach-of-the-peace charge had been a pretext to insure his continued custody to that end. A state psychiatrist testified that Culombe was "*suggestible*." Culombe's conviction for murder was affirmed by the Connecticut Supreme Court of Errors. On certiorari, the Supreme Court reversed.

See Note, 9 Stan. L. Rev. 515, 536-37 (1957);
367 U.S. 568 (1961), reversing *State* v. *Culombe*,
147 Conn. 194, 158 A. 2d 239 (1960).

Absent from the record was evidence of physical or mental brutality, protracted questioning, deceitful tactics aimed to elicit a confession, or a defendant suffering from severe mental illness. That the defendant has been refused counsel, detained for a substantial period incommunicado and was of subnormal intelligence in combination is indicative of some police misconduct perhaps aggravated.

See also: *E. G. Reck* v. *Pate*, 367 U.S. 433 (1961);
Blackburn v. *Alabama*, 361 U.S. 199 (1960);
See *Lisenba* v. *California*, 314 U.S. 219, 240 (1941);
C. F. Fikes v. *Alabama*, 352 U.S. 191 (1957);
Crooker v. *California*, 357 U.S. 433 (1958);
Cicenia v. *Lagay*, 357 U.S. 504 (1958);
Stein v. *New York*, 346 U.S. 156, 184-87 (1952);
See *Malinski* v. *New York*, 324 U.S. 401 (1945);
Ashcraft v. *Tennessee*, 322 U.S. 143 (1944);
Paulsen, the fourteenth amendment and the third
degree, 6 Stan. L. Rev. 411, 416-21 (1954).

So patent was the police officers' flouting of the elements of such procedure that it was necessary to exclude the fruits of their misconduct, whether or not it was entirely clear that Culombe's will to resist had been broken.

In *McNabb* v. *United States*, 318 U.S. 332 (1943), the Court held confessions inadmissible *per se* in federal courts if obtained during illegal detention. In large part the *McNabb* holding was predicated on the Court's supervisory power over federal law enforcement officers, who had consistently ignored federal prompt-arraignment statute. But *McNabb* also pointed out that the use of third-degree

methods could normally be inferred from the single fact of illegal detention. Proof of such methods by a suspect detained in isolation by his police captors in inherently very difficult.

B. Permitting Doctors Appointed Before Plea to Testify As to Defendant-Patient Is a Violation of Equal Rights

As to question two, the trial court appointed psychiatrists to assist counsel in determining the mental condition of the two boys before entering pleas. This was done prior to a plea in the case upon a special petition and not upon a plea of insanity, and it was the contention of the defense that if the boy on trial had had adequate funds that he could have hired his own doctors and any of their findings would have been privileged, and doctors could not have been forced to testify against the interests of their patient. However, in the case at bar, the trial court ruled that a doctor appointed in these circumstances could testify against the defendant patient. The Colorado Supreme Court did not consider this a basic right of the petitioner and did not consider that any basic right had been violated. The Colorado court by its action here has stated that a person who is without means must provide whatever findings are arrived at by the doctor even if this results in providing evidence against himself; whereas, a person of means would not have to provide any such evidence since there would be a doctor-patient relationship existing. Thus, it may appear that in Colorado, insofar as this petitioner is concerned he could not expect equal protection of the law because he was a poor boy. Had he had the means to pay his own doctors, the doctors' testimony could not have been used for any purpose whatsoever. Colorado Revised Statutes 1953 Chap. 153-1-7 (4) and (8) provide physician may not testify without consent.

The case of *Griffin* v. *People of the State of Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R. 2d 1055, has within it interesting points regarding equal justice for the poor.

See also Colorado Revised Statutes, 1953, Chap. 40, Article 1, Subsection 3: "A person . . . sound mind . . . 14 . . . or before that age if such person knows distinction between good and evil."

C. Permitting Evidence Used in Juvenile Court to Again Appear in District Court Is Manifestly Unfair to Juvenile Defendant Under Constitution

Question three as to statute restricting evidence used in Juvenile courts is important.

The law in Colorado is: Section 22-8-1, Colorado Revised Statutes 1953, and provides among other things, "a disposition of any child under this article or any evidence given in any such case shall not in any criminal or other cause or proceeding whatever, be lawful or proper evidence against such child for any purpose . . ." The District Court could not have considered the same evidence in the murder trial that was presented in the Juvenile Court. No Colorado cases have specifically considered this point. But the statute seems so clear that we are at a loss to see how the District Attorney or the Trial Court could have failed to read it to foreclose the District Attorney in using the same evidence in the District Court that had already been used in the Juvenile Court.

However, some Colorado cases throw a little light on the matter. The case of *Lindsey* v. *People*, 66 Colorado 343 at 352-3 says: "This section . . . prohibits the giving of the evidence taken . . ."

People v. *Lewis*, Ct. of Appeals of New York 1932, 260 N.Y. 171, 183 N.E. 353 (289 U.S. 709, 53 Sup. Ct. 786, 77

L. Ed. 1464). In Children's Court, boy 15 years old accused of theft of money. Questioned by the Court. Full admission and no attempt at denial. Boy adjudged delinquent and committed to State Industrial and Agricultural School.

Upon appeal, reversed on ground that the specific act upon which the delinquency charge is based would be a felony if committed by an adult and must be proved in substantially the same manner. The judgment is supported by no evidence received in the boy's presence and rests solely upon his own confession made without warning against self-incrimination. (Fifth Amendment.)

"*Neither the fact that a child has been* before the Children's Court for *hearing, nor any confession, admission or statement* made by him to one Court *or to any officer thereof where* he is under *age of 16 years*, shall ever be admissible *as evidence against him* or his interests in *any other court*."

Judgment of Appellate Division reversed and of Children's Court affirmed.

Harling v. *United States*, 295 F. 2d 161, C.A.D.C.: In this case a 17-year-old boy made damaging statements. He was taken into custody at 10:30 P.M. and made damaging statements at 10:30 A.M. the next morning. He was held for a total of five days before trial.

Court held: It would offend these principles to allow admissions made by a child in non-criminal and non-punitive setting to be used later for purpose of securing his criminal conviction and punishment.

If used later they destroy Juvenile Court's *parens patria* relation to the child and violate the non-criminal philosophy which underly Juvenile Courts.

Court notes: "Standards for Specialized Courts Dealing with Children," Children's Bureau, United States Department of Health, Education & Welfare, 1954, pp. 38 and 39.

"Where child questioned alone by police officers without opportunity to secure presence of his parents, or guardian or counsel, his statements during such interview should be presumed to have been induced either by child's immaturity or by idea they would be used only in the specialized court, and should therefore, unless presumption is overcome, be excluded from admission before criminal court."

D. Waiver of Jury Is Permitted in Colorado and Is As Important a Right As the Reverse, and Denial Herein Is Violation of Basic Right

Question four seems clear that any person should have the right to waive a jury trial. The right to waive a jury is as important as the right to claim a jury.

The cases in Colorado all indicate that a jury trial may be waived by a defendant. The case of *People* v. *Graham*, 134 Colo. 290, 302 Pac. 2d 737, states only that a jury cannot be waived where the death penalty is involved, since the jury must decide upon this; but in this case the death penalty could not have been an issue for the reason that the age of the defendant was such that the death penalty could not attach. Therefore, the Court erroneously ruled that the jury trial could not be waived.

There was no degree involved herein, and the jury could only find the defendant guilty of murder (life imprisonment) or not guilty.

Therefore under the law, a jury trial in this case could properly be waived, and the trial court improperly denied this.

The federal courts clearly allow a waiver of a jury; *Adams* v. *U. S. ex rel. McCann* (1942), 317 U.S. 269, 605. (Rehearing denied.)

VIII. Conclusion

It is our contention, therefore, that in all respects herein argued the petitioner's rights under the due process and equal protection clauses were violated.

In conclusion, a child, Robert, is held in isolation, and questioned at least three times, not warned as to right not to speak, not permitted to see mother, not advised of his right to counsel, ultimately a signed statement is secured; then before a plea a special petition is made to appoint doctors to examine Robert, and the trial court permits these doctors to testify against this indigent boy. The law in Colorado states that the disposition and evidence used in a Juvenile Court cannot be used in any criminal proceeding yet that exactly was done here; finally, the boy elected to waive a jury and even this basic right was denied. For all the foregoing errors amounting to a denial of Constitutional rights the defendant is aggrieved.

Therefore it appears that substantial Constitutional rights were violated, and it is prayed by Robert Gallegos, petitioner, that the Honorable Supreme Court of the United States reverse the judgment.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 475

ROBERT ELMER GALLEGOS, Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

ANSWER BRIEF OF THE RESPONDENT

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ANSWER BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Between 8:30 and 9 P. M. on December 20, 1958, while defendant, then fourteen years old, and two other boys were shining shoes in downtown Denver, they thought of a plan to rob an old man. He was partially drunk and they followed him to a hotel. After the man entered the hotel, the three boys followed, but left one by the door to act as a lookout. Defendant and the other boy then went upstairs and, since they had lost track of the old man, they asked several people if their grandfather had

just come in and what room he had entered. They were told that the old man next door had just come in, so they knocked at the indicated door. The boy with defendant asked for a drink of water and, when the old man either brought the water or turned to get it, the other boy grabbed him and defendant hit him with a shoe brush. When the old man fell to the floor, the boys held a knife to his throat and took his wallet. The two boys then ran down the stairs, picked up the lookout at the door, and all three ran on to a viaduct. There they split up $13.00 found in the wallet and threw away the billfold and the shoe brush.

On the evening of January 1, 1959, defendant was questioned by Officer Chism, who had a record of the assault and a description of the suspects. Defendant immediately admitted his part in the crime. He was then booked in at Juvenile Hall and the next day he once again confessed and, except for the date, gave all of the details of the offense as related above (R. 116-118, 195-199). Then on January 7, 1959, he signed a complete statement, in which he repeated once again the account of how he and the other boys had beat the old man and taken his money, and affirmed the date as December 20, 1958 (R. 208-217).

Almost immediately after the attack, the victim was taken to the hospital. An examination made upon his arrival showed two fractures in the front part of his jaw, one in the rear, a cut on his neck, and another bruise on his jaw. Four days after the victim entered the hospital he became unconscious and was examined again. Several blood clots were found which were "secondary" to the blows he had received on the head and there was also evi-

dence of severe blows on the jaw. In spite of various medications and surgery, the victim did not respond to treatment and died on January 26, 1959, of brain injuries. The death certificate in this case lists bronchial pneumonia as the cause of death, but the doctor involved and the coroner's pathologist actually felt that the bronchial pneumonia was a secondary cause of death, and that it was more correct to say that the victim died of brain injuries which lead to bronchial pneumonia (R. 84-113).

All of the above evidence was brought out during the People's case. In a hearing out of the presence of the jury to determine if defendant's confessions were voluntary, defendant denied any participation in the offense and denied ever making any oral admissions. The written confession, he claimed, was forced out of him (R. 156-165). During the defense case, defendant did not take the stand, but presented several witnesses in order to establish an alibi. These witnesses all claimed that defendant and the other two boys supposedly involved in the assault were all in the home of one of those boys the entire evening, from seven o'clock on watching television (R. 226-246). Defendant also presented the testimony of the court psychologist of the Denver Juvenile Court. It was his opinion that the fourteen year old defendant in this case had an IQ of seventy so far as his ability to communicate is concerned, which means that he has the language ability of an average eight or nine year old. He went on to say that the defendant has feelings of insecurity and inadequacy and of being retarded, but that his over all IQ was 83, equal to that of the average ten or eleven year old (R. 263-271). Prior to the time that the victim of the involved assault died, defendant had been brought before juvenile court for his part in the assault and had been committed

on January 15, 1959, to the State Industrial School at Golden, Colorado (R. 18-25).

Though the defendant pleaded not guilty, the jury returned a verdict of guilty of first degree murder on June 19, 1959, and sentenced defendant to life imprisonment (R. 36, 57, 304). A motion for a new trial was made and denied. On August 18, 1959, the court sentenced the defendant in accordance with the verdict of the jury (R. 63, 311). On December 19, 1960, the trial court's judgment was affirmed by the Supreme Court of Colorado (R. 314-324).

ARGUMENT

I.

DEFENDANT'S CONFESSION WAS PROPERLY ADMITTED INTO EVIDENCE BY THE TRIAL COURT.

In order to understand our position regarding defendant's confession and the lack of any coercion in obtaining it, we must point out a series of events leading up to the giving of that confession.

The prosecution's evidence showed that on January 1, 1959, an officer picked up both defendant and his nine-year old brother at about 8 P. M. in downtown Denver, Colorado (R. 115-116, 121). Right there in the officer's automobile the two were first interrogated about the crime here involved and they immediately admitted their involvement (R. 115-116, 120-121, 205-206). They were then taken to Juvenile Hall and the next day both defendant and his brother Richard again admitted this offense and gave all

the details thereof, and also admitted another similar offense (R. 116-118, 122, 197-199). About 8:30 P. M. on January 2, 1959, all of the boys involved gave a complete account of the crime they had committed and defendant himself gave a complete confession as to all of the details while the officer recorded the information in longhand (R. 121-126, 197-199).

During the time defendant was held in Juvenile Hall, after that, he was kept in security, which means he was in a room by himself, but allowed to eat with other inmates (R. 211). He was told he could see his parents and or an attorney, but he requested neither at any time while in confinement (R. 139, 147, 211). On January 7, 1959, defendant signed a written statement containing the same details to which he had twice previously confessed orally (R. 208-217).

The first night the defendant was picked up, his mother was advised where he was, how serious the matter was, that defendant could have an attorney, and that visiting hours were 7 to 8 P. M. on Monday and Thursday (R. 134-136, 204, 224). That was on a Thursday night. Mrs. Gallegos tried to see her son on the second of January, which was a Friday night, and was again advised she could see him on visiting hours on Monday and Thursday nights (R. 223). The next time Mrs. Gallegos tried to see her son was on the following Thursday, January 8th, and that time she succeeded (R. 225).

In defendant's brief, the next to the last paragraph on page 11 makes several sweeping statements which are either incorrect or misleading, or both, and should be cleared up prior to proceeding with this argument.

(a) *Defendant was kept in "solitary confinement".* The brief nowhere defines solitary confinement. However, the record is undisputed to the effect that defendant was kept in a room by himself and was allowed to eat with the other juveniles then in custody. This is hardly solitary confinement in the usual sense of the word.

(b) The next part of defendant's brief says that *defendant was held "for a period of 5 days and until the written statement was secured."* We have already shown that defendant confessed to this crime immediately upon being arrested; he was then held for investigation of this and another similar crime, and a written statement was obtained from him before he was released. However, since he confessed to the crime here involved immediately upon his arrest, it is misleading to imply that he was held in solitary confinement for a period of five days in order to force him to confess to anything.

(c) *"This 14 year old boy was of the mental age of eight."* There is absolutely nothing in the record to substantiate this statement and we consider it a breach of ethics on the part of counsel to present such a statement to this Court. Pages 265 and 266 show that the psychologist called at the trial by defendant himself stated that, although "he speaks the language of a child you might expect at eight or nine * * * I would say he is probably functioning at the level one might expect of a normal child of eleven, maybe ten."

(d) *"Defendant did not have the benefit of counsel."* We have already pointed out that defendant's mother was informed he could have counsel and defendant himself

was offered and rejected the aid of counsel while he was in confinement.

(c) *Defendant was a "Spanish-speaking child."* This we consider perhaps the most unsubstantiated and unethical statement in the entire brief. There is absolutely nothing in the record before us to support this. On the contrary, the record is replete with discussions of defendant's having been interviewed by various police officers and having been able to "read good" a statement in English set before him (R. 128-130). As a matter of fact, during the course of the trial he even took the witness stand out of the presence of the jury to testify regarding the conditions of his confinement in Juvenile Hall. At no point is there any reference to any interpreter ever being used. Not one of the police officers mentioned that there was any language barrier between themselves and the defendant. On what basis it can be claimed that defendant "was a Spanish-speaking child" we do not know. It is obvious from the record that defendant speaks English very well. His answers during the time he testified before the court (outside the presence of the jury) will show that. If he speaks any other language, there is no revelation of that fact anywhere before us.

Thus, it can be seen that much of the proffered basis for defendant's position here, far from being supported by the record, is completely refuted by the record.

Defendant next goes on to cite many cases from both federal and state courts, to the effect that any confession which results from coercion must be considered unreliable and, therefore, is inadmissible in court. We have no quarrel with any of those cases, although we cannot help but note that many of them concern situations where an ac-

cused was subjected to far greater physical and mental coercion while in confinement than was the present defendant. However, it is our position that none of those cases apply to our fact situation because they all discuss a confession which was obtained subsequent to and as the result of coersive forces exerted on the accused during his confinement. None of them discuss a situation such as ours where the defendant at the moment of his arrest and before he was subjected to any confinement or any pressure of any kind, immediately sat in the police car with the officer and confessed his involvement in the crime involved. Defendant appears to admit in his brief that none of these forces which he claims were exerted upon the defendant were even begun until after the night of January 2, 1959. By that time, defendant had not only made his initial confession upon his arrest, but had also made another and much more detailed oral confession of both the crime involved here and of another similar incident. This court has held numerous times that, if a first confession was involuntary, any subsequent confession if closely connected in time and place, and if the defendant was still under the same or similar coersive forces, will also be assumed to have been involuntary. 4 Federal Digest, Cum. Supp., 273, Criminal Law, Sec. 519(2). However, it has been held elsewhere that the converse is also true, and that, therefore, if the first confession is voluntary, it is assumed that any later ones are also voluntary in spite of intervening claimed coersive forces.

> "Of (defendant's) several confessions, his first is the controlling one, the presumption being that the repetition of a confession is the product of the same circumstances which produced the original one."
>
> *People v. Latasco*, 406 Ill. 303, 94 N. E. (2d) 178.

It is true, of course, that in the hearing out of the presence of the jury defendant denied ever having confessed either at the time he was first picked up or the next day, and claimed that the subsequent written confession five days later was forced out of him. However, the court made its ruling that these oral confessions, which the police officers said they heard defendant make, prior to any claimed "solitary confinement" could be and were presented to the jury for their consideration. We believe the trial court was well founded in this decision. Surely, it seems logical that any confessions at all made by an accused immediately upon his arrest must be voluntarily given because of an inward desire to confess, and not because of any claimed pressures exerted upon him during subsequent confinement. And, if those were voluntary, the logical reasoning of the case cited above would support a finding that the confession of the same crime five days later, after the intervening confinement, was also free and voluntary.

As to defendant's other minor points involving his age, his being away from his parents, and his lack of counsel, all of these are well answered by the following quotation, which to a large extent summarizes our position on this matter:

> "Appellant's principal argument that defendant's first and second written confessions were coerced stems from the fact that the confessions were made to police officers, that the defendant was then only 16 years old, was 1,200 miles from home, was dirty, tired and nervous, in an upset emotional state and without counsel. The fact that a confession is made while a prisoner is in the custody of armed police officers

will not render it involuntary. Commonwealth v. Jones, 341 Pa. 541, 548, 19 A. 2d 389, nor is a confession invalidated because the accused was not represented by counsel, no request for such representation having been made. Commonwealth v. Bryant, 367 Pa. 135, 145, 79 A. 2d 193. Appellant's youth, distance from home and nervous condition at the time he made his first written confession does not of itself render the confession inadmissible, particularly where the confession is corroborated by other evidence. Cf. Commonwealth v. Cavalier, 284 Pa. 311, 131 A. 229. These are facts to be taken into consideration by the jury in determining whether or not the confessions were voluntary and the jury was so instructed by the court in its charge. See Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161."

Commonwealth v. Smith, 374 Pa. 220, 97 A. (2d) 25, 32.

II.

NO COURT-APPOINTED PSYCHIATRIST WAS EVER CALLED TO TESTIFY AGAINST THE DEFENDANT.

Pages 15 and 16 of defendant's brief elaborately argue that it is a denial of equal rights for the court to allow testimony from a court-appointed psychiatrist who examined the defendant prior to the defendant's having entered any plea. His main basis for this argument appears to be that such a procedure denies equal rights to rich and poor because a person of means would have and could have hired his own personal psychiatrist, rather than be examined by one appointed by the court, and his own personal psychiatrist would have been forbidden by

the well-recognized doctor-patient relationship from revealing any fact learned in the course of a psychiatric examination.

Defendant raised this same point at the time this case was before the Supreme Court of Colorado and again in his petition for certiorari before this court. We answered in both those cases, and we answer again here, that we are unable to find in the record any testimony from any of the doctors here involved regarding defendant, and therefore we fail to understand the relevancy of this point to the case before us. It is noted that nowhere on pages 15 and 16, where defendant's brief argues this point, is there one reference to a single page in the printed record. In his "abstractions" on page 9 of his brief, defendant does point out that at his request the trial court appointed three doctors to examine defendant prior to his plea (R. 11). Later, each of the three doctors *reported* to the Court *by letter. They did not testify.* The letters showed that one found the defendant incapable of adhering to the right, but the other two failed to come to that conclusion and found defendant sane (R. 12-14). The court did say it would allow the doctors to testify on the ability of the three defendants then on trial to distinguish between right and wrong, and to understand an oath. But the two of the doctors who did testify did so only as to Martinez' ability in this regard (not defendant's) and to Martinez' ability to understand the meaning of an oath (R. 169-177). The case was then dismissed as to Martinez (R. 191). The record's index (R. I to VI) shows no other appearances by any of the three doctors, and we have been unable to find such appearances after searching the record three times. In spite of seemingly contrary earlier rulings, later in the trial the court specifically ruled that it would not

allow testimony by these doctors (R. 218-219). None was ever received, and we are at a complete loss to understand how this defendant can complain of error because of the calling of three psychiatrists when not even one ever appeared to give one word of testimony relative to him.

III.

COLORADO'S INTERPRETATION OF ITS OWN JUVENILE DELINQUENT STATUTE DENIED DEFENDANT NO CONSTITUTIONAL RIGHTS.

Defendant points out that the Colorado statute on the matter says that evidence given in a juvenile court proceeding shall not be used against a child in a later criminal proceeding. In this case, defendant was first adjudged to be a juvenile delinquent based upon the robbery of the victim in this case, and then later defendant was criminally prosecuted for murder after the victim in this case had died. Much of the same evidence was used in both of these proceedings, but the Colorado Supreme Court ruled, in effect, that the prohibition was against using evidence made known for the first time in the juvenile court proceeding. In other words, a transcript of the juvenile court proceeding could not later be used in a criminal prosecution against the same child, but a confession obtained prior to either proceeding could be used in both. It is our position that such interpretation by the Colorado Supreme Court is well founded under the reasoning presented in that court's opinion (R. 321-322). It is further noted that the very first part of Colorado's Juvenile Court Act says that that statute applies only to persons who are not inmates of the Colorado State Industrial School for Boys. Since defendant was an inmate of that institution

at the time he now claims he was denied the protection of that statute, it is obvious that he was not even within the group of persons covered by the statute. We also wish to point out that the United States Supreme Court generally requires a federal question to be presented, as such, in the trial court before it is worthy of consideration here (See cases and notes collected in 36 C. J. S. 748, et seq., 762, et seq.). It is our position that, even if defendant were right in all of his assertions, we fail to see how any federal constitutional right has been denied by this interpretation of this statute, and we fail to see in the record where defendant, in either the trial court or the Colorado Supreme Court, even called it a federal constitutional question or attempted to have it decided in that light (R. 47-48). Obviously, this is merely a matter of a state supreme court interpreting its own state's statute. No federal question is even involved. In the circumstances, the question, we feel, is not entitled to review here.

IV.

NO FEDERAL CONSTITUTIONAL RIGHT WAS DENIED TO THE DEFENDANT WHEN THE LOWER COURT REFUSED TO ALLOW HIM TO WAIVE A JURY TRIAL.

Prior to this case, Colorado had held that a jury must be present in every murder case to decide the degree of murder involved and the possible penalty.

Graham v. People, 134 Colo. 290, 302 P. (2d) 737;
Mansell v. People, 122 Colo. 420, 222 P. (2d) 615.

Therefore, when defendant requested that a jury be waived in this case, the lower court, of course, denied the motion.

Defendant now claims that, since defendant was not of the minimum age necessary to receive the death penalty in Colorado, there was nothing for the jury to decide and his request to be tried by the court alone should have been granted. This reasoning revolves around the fact that whenever a defendant in Colorado is convicted of first degree murder, *and is over eighteen*, the jury must decide between the death penalty and life imprisonment. If under eighteen, as here, life imprisonment is the only possible penalty. However, defendant completely ignores the fact that the jury must also decide the degree of murder because the accused could be convicted of only second degree murder, and then the penalty is ten years to life, regardless of age. The court, of course, at the start of the trial had no way of knowing how many degrees of murder or manslaughter might be submitted to the jury on the evidence that would later be presented. (At the close of the trial, defendant requested instructions on all degrees of murder and manslaughter). In those circumstances, the jury had to be held whether defendant wanted it or not.

Colorado is not alone in its decision to refuse to allow jury waiver in some cases.

> "At common law an accused in a felony case could not waive his right to a jury trial."
>
> 50 C. J. S. 792.

Many states are still of the opinion that a defendant is not always entitled to waive a jury trial in certain cases or in certain classes of cases.

> *State v. Christensen*, 166 Kan. 152, 199 P. (2d) 475;
> *Gutierrez v. First Judicial District*, 52 N. M. 28, 191 P. (2d) 334;

State v. Harper, 235 N. C. 62, 69 S. E. (2d) 161;
Berge v. State, 168 Tex. Cr. 515, 330 S. W. (2d) 195;
State v. Pondolfo, ... N. D. ....., 98 N. W. (2d) 161;
Alldredge v. State, 239 Ind. 256, 156 N. E. (2d) 888;
Tackett v. Com., ... Ky. ....., 320 S. W. (2d) 299;
Scaiber v. State, ... Ark. ....., 291 S. W. (2d) 241;
State v. Scalise, 131 Mont. 238, 309 P. (2d) 1010;
Com. v. Taylor, 193 Pa. Super. 386, 165 A. (2d) 134;
Corder v. Cochran, ... Fla. ....., 123 So. (2d) 249 (appeal pending to U. S. Supreme Court);
Jones v. State, 206 Tenn. 245, 332 S. W. (2d) 662.

And, although defendant points out that federal courts allow the waiver of a jury trial, he fails to point out that even there such waiver must be approved by the court and consented to by the government.

Hasan v. U. S., 250 F. (2d) 704.

CONCLUSION

Our position before this Court can best be summarized by quoting the concluding paragraph of the opinion rendered by the Supreme Court of Colorado. We believe that Court's sentiments on the matter are equally applicable here (R. 324):

> "Much of what has been argued in this court might carry substantial weight if presented in connection with an application to the Governor for commutation of sentence or other relief by way of executive clemency. It is not the function of this court to reverse a judgment entered in a criminal case following a trial conducted, in all material respects, in harmony with the legal principles applicable thereto, even though

as a result of said trial a fourteen year old boy is sentenced to imprisonment for life. The defendant had a fair trial under the applicable legal principles. It is our duty to affirm the judgment, and it accordingly is affirmed."

Respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 475

ROBERT ELMER GALLEGOS,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

I

Statement of the Case

Discrepancies can be noted in what witnesses said from the whole record. But the defendant is entitled in a criminal case to the construction favorable to him where there is a reasonable doubt. Let us look at the record to verify the discrepancy in testimony, giving an example:

Detective Paul O. Chism, kept by the District Attorney as his witness in the trial before the jury, had testified previously in the hearing on the plea of former jeopardy:

> Q. The fact of the matter is that you did testify from your same statements as given to the Juvenile Court. Is that correct?
>
> A. Except for the fact that Mr. Smith died.
>
> Q. But everything else would be the same. Isn't that true?
>
> A. Yes.

Q. In other words, you would not change the statements in any way, would you?

A. No, sir.

Q. And you would have no additional information you would add to it, would you?

A. Except the fact Mr. Smith died.

Q. Now, in your investigation, according to Judge Gilliam's (fol. 51) testimony, there were actually two statements made?

A. Two separate reports, yes, sir.

Q. As I understand, they first made one statement and then changed it.

A. I understand you now. Yes, sir, that is correct (R. 27).

The same witness, Paul O. Chism, however, upon the trial:

> The Court: Who did this?
>
> The Witness: Robert. And then he proceeded to get his billfold out of his rear pocket and left.
>
> That was the first information I had from the boys. I have the information here.
>
> *I took Mr. Kruhd to Juvenile Hall where he identified Robert and Eddie as the boys that had assaulted him.** I took Mr. Kruhd to Juvenile Hall 1/5/59 at 5:10 p. m. He identified Robert Gallegos as the one that held him and Edward Martinez as the one that struck him.
>
> . . . He also told me after they followed Mr. Smith, that he and Robert followed Mr. Smith upstairs and locating him in his room he asked for a drink of water, and when Mr. Smith brought it to him he grabbed Mr. Smith and Robert struck Mr. Smith with a shoe brush. Robert verified the information on both parties and added one other thing (R. 193).

---

* Italics ours unless noted.

> *I told them that Robert stated* one had a knife and I asked which one had a knife. . . . (R. 118)

Eddie Martinez, 11, was not picked up until the following day, therefore no statement could have been secured from all three as testified, until Bobby Gallegos had been in solitary at least 24 hours (R. 125).

II

ARGUMENT

The defendant is entitled to a construction of the facts that would give him the benefit of all reasonable doubt.

A. Defendant's Confession Was Involuntary and Improperly Admitted.

Let us look at the record again to show that Exhibit D was obtained after holding this child in solitary confinement for five days. The statement that was first given was a complete denial (R. 161-163). Detective Charles W. Miller (R. 211):

> A. No sir. We were out of the Juvenile Hall and I asked the three boys—they were brought down—and that I told them that it was my job *to attempt to obtain a statement*, and at that time I outlined what I had previously said . . .
>
> Q. Now with reference to your first request as to whether or not he wanted a lawyer, what did Robert say to that? Did he answer it at all?
>
> A. Yes. They shook their heads—*I mean, they gave me no indication.*
>
> Q. So when you asked if they wanted their parents, they shook their heads did they?
>
> A. *They did not indicate they wanted them there.*

Q. And when you told them it had to be voluntary, what did you say?

A. I told them they did not have to come with me to the Police Building, and they said they wanted to go. . . .

Q. And you previously talked to Richard at Juvenile Hall?

A. Yes, sir.

Q. What date was that?

A. I believe it was the evening of January 3.

Q. And Richard Gallegos was the boy eight years old?

A. He was eight years old (R. 214).

Mother of Robert Gallegos:

Q. When he was first there, did you go to see Robert? (R. 223)

A. I went on the 2nd of January, and when I got there they told me I could not see Robert because he was under investigation. . . .

In the answer brief the above is cited as evidence, but this evidence was stricken by the court (R. 225). However, there is no dispute that Mrs. Gallegos was not permitted to see her son on the 2nd of January, 1959, and was not permitted to see him until the investigation was complete.

. . .

1. Insofar as to the question of whether *the defendant was kept in solitary confinement is concerned*:

Q. How long was Bobby Gallegos kept in *solitary* confinement before he gave you this final statement?

A. Which statement do you mean?

Mr. Vigil: . . . But they cooperated with you in holding this boy, Robert Gallegos, by holding him in *solitary*?

A. They held him in *solitary* as you put it, which is security by rules of the Juvenile Hall. I didn't have anything to do with that.

Q. It is *security* as you put it, a room where they keep a man where he cannot talk to anybody?

A. That is correct (R. 204).

Q. And you did not tell him, did you, that *he could have a lawyer*?

A. No, sir.

Q. He was the first one to talk to you about this, isn't that true? (R. 205)

A. That is a little different. All three boys were in the car and upon asking what happened, Richard was the first one that mentioned about what happened. Then Robert told me (R. 206).

Q. And based on that information you secured, you immediately took them to Juvenile Hall and asked they be put in *solitary*?

A. Most certainly not. I had nothing to do with putting them in *solitary*.

Q. You know they are placed in solitary, don't you, when you take them to Juvenile Hall?

A. Yes, for *twenty-four hours*. That was on the order of the court.

Q. But in this particular case *Robert was kept there for seven days*.

A. *That I do not know*.

Without Exhibit D, which was the signed statement, there would be no evidence against the defendants (R. 116).

The mother was not advised how serious the matter was nor that the defendant could have an attorney (R. 134).

What does the record say of solitary confinement?

Detective Paul O. Chism:

Q. Did they put them in *solitary*?

A. That I don't know.

Q. You know that is customary?

A. I know it is customary.

Q. How long do they keep them there?

A. Twenty-four hours.

Q. How long did they keep these boys?

A. I don't know.

Q. Did they question them there for all five days while they were there?

A. *I more or less*—you have the information they had given me.

Q. You have here what has been marked as People's Exhibit A. This is a statement you stated had been written in longhand and apparently signed by all three of these boys?

A. Yes, sir.

Q. Do you contend this is a joint statement made by all three of them at once?

A. They were all together. . . .

Q. Is it the information from all three or one?

A. All three (R. 123).

Nothing shows Bobby Gallegos was warned that his statements had to be voluntary (R. 132). The shoe brush was secured by Detective Chism by going to the home of Robert and getting his shoe shine kit where all of them identified the shoe brush as the one *Eddie* used (R. 134).

Detective Miller states that the boys are generally kept in solitary twenty-four hours and that they had been kept in solitary (R. 142).

Detective Miller talked to Richard, age 8, on the evening of January 3d (R. 143).

Robert Elmer Gallegos stated that Detective Chism had said that he had beat up some old man, but that he, Robert Gallegos told him he had nothing to do with it and "didn't know nothing about it". Robert states that he was kept in a room alone for five days. Nothing was said about a lawyer or talking to anyone, including his mother and that he was questioned three times and the first time he told the officer that he knew nothing about this (R. 156).

District Attorney Kane states:

> Q. You knew about the procedure, and so on, this *solitary*?
> A. Yes (R. 160).

Bobby Gallegos states that he was taken from solitary to the Police Building and then put back in security and the next day he got out (R. 162).

The record is replete with references to "solitary" (see R. 178, R. 203, R. 204, R. 206, R. 211, R. 223-225).

2. *Bobby Gallegos was held for a period of five days and until the written statement was secured.*

The District Attorney, in the trial of this case, was relying upon the written statement, Exhibit D, in order to secure a conviction.

The first alleged oral statement was a total denial by Bobby Gallegos. His eight-year-old brother made a statement to the officers after being held incommunicado for at least two days until the evening of January 3d. Police listened over a bugging system, then took a statement (R. 144). We heard Eddie Martinez say, "What did you tell that guy?" Then Richard, 8, stated "I told him the truth". . . . (over bugging system) . . . we ran up (R. 146).

The opinion of the Supreme Court of Colorado at page 10 quotes from the record (R. 164).

> Q. These answers right here (indicating Exhibit D) that you gave Detective Miller, what was the reason you gave those answers? (R. 164)
>
> A. I was scared that if we did not do it they would keep us in security longer. . . .

If, as the answer brief contends, they already had a confession from Bobby Gallegos, it was not necessary to hold him in *solitary* confinement until he signed Exhibit D, which was the exhibit used to convict Bobby Gallegos in Juvenile Court and District Court.

The District Attorney stated that no other evidence to convict existed except Exhibit D.

> Mr. Rossman (District Attorney): With the ruling of the Court *on the statement as to Eddie Martinez*, and as to the inability to testify, we have no way of proving anything against Eddie Martinez without the confession (R. 191).

3. With regard to this 14-year-old boy, *we say he was mentally retarded and that he had, in accordance with the record cited, a mental age of 8*:

> A. This, in the I. Q. test, if he is fifteen he would be about eight or nine; he speaks the language of a child you might expect at eight or nine. . . . and to agree at a proper time and *I am sure he would follow in a given situation* (R. 264). . . .
>
> Q. On the basis of that test do you feel he might make statements to attract attention?
>
> A. Yes. . . .
>
> Q. Doctor, what do you think would be the effect on this boy being confined for seven days in a room

alone, although he might be permitted to have his lunch with other boys, would that have any effect on his making a statement?

A. I don't doubt that being confined for seven days in a room alone would have an effect on his making a statement.

Q. And would that be the effect of complying with whatever was requested of him, is that correct?

A. I imagine it would have that effect, yes (R. 267).

The letter submitted to the Court by Dr. L. V. Tepley, a psychiatrist (R. 14): " . . . Robert Gallegos was deprived of many of these contributing forces to such an extent that he is inherently incapable of resisting an impulse to do wrong, if led or encouraged by a more aggressive companion" (R. 14).

4. *The defendant* (and his two companions, one age 8 and the other age 11), *did not have the benefit of counsel.*

Q. Now, you had previously talked on January 3d to Richard because he had called you out there to talk to you. Is that correct?

A. That is correct.

Q. *When you talked to Richard did you tell him he didn't have to tell you anything, that he could have a lawyer or call his parents?*

A. *No.* I asked Richard what he wanted to tell me (R. 147).

Although one of the detectives testified that he offered counsel to the boys, that they did not give him any response, and the boys testified that they were not offered any counsel nor were they permitted to see their parents. The mother was not permitted to see her son when she went to the Juvenile Hall to see him (R. 159-211, R. 223-225).

B. The Court-Appointed Psychiatrists Were Called to Testify.

To reiterate: The testimony of the doctors appears (R. 167. See also R. 168).

> The Court: I will make it clear for the record. Calling psychiatrists has nothing to do with whether or not the boys are sane or insane. The statutes provide that where the defendants are children they must know the distinction between good and evil and the question of sanity or insanity has nothing to do with it. Under the statute the Court has to know, and it has to be shown, whether they know the distinction between good and evil. Assuming they are both sane, the Court must know whether they know the distinction between good and evil. . . .
>
> The doctor's report made to the court was that both boys knew the distinction between good and evil and that is why I called the doctors in.
>
> The court is doing this, of course, because the court fully realizes that in this trial we are dealing with children and we have to have some help . . . (R. 170).

Dr. Charles A. Rymer called as a witness (R. 172).

> Q. Do you know you were called at the instance of these boys, that is you were to make the examination at their instance . . .
>
> The Witness: Mr. Cisneros did call our office after he knew I was appointed (R. 173). . . .
>
> Q. For the record, your name.
>
> A. R. Robert Cohen, physician, specializing in psychiatry.
>
> Q. In accordance with an order of this court you were appointed to examine the defendant . . . (R. 174) to examine the defendant Robert Gallegos, and Eddie Martinez.

A. Yes, sir.
Q. And you did make such examination?
A. Yes, sir....

C. All Laws Must Be Interpreted to Give an Individual the Benefit of an Equal Interpretation Under the Due Process Clause of the Constitution.

Colorado's interpretation of its own Juvenile Delinquent Statute must be in conformity with what is obviously intended by the legislature and the Colorado courts must follow the plain language and the intent as indicated by the Court and also follow the clear understanding of this statute. The answer brief states that Bobby Gallegos was an inmate of the State Industrial Scho . But it was for the exact and same factual situation on which the murder charge in the District Court was based.

Obviously this is not an exception under the law and the situation of Bobby Gallegos is that he was in the Industrial School because the District Court convicted him on the same statement of facts that he was convicted upon in the Juvenile Court. Every individual is entitled to the equal protection of the law, and the equal protection of the law obviously refers to the equal construction of these laws with regard to the entire United States, and not with regard to the position or feelings of the court in the State of Colorado.

With reference to the offense that was committed, the United States Supreme Court can construe any state statute and can decide any state law and determine the laws so that they apply with their plain and ordinary meaning and it is clear that the argument in the answer brief could not in any situation be binding upon the United States Supreme Court, for if this were so the United States Supreme

Court would be foreclosed in all instances in determining matters involving state statutes where the State Supreme Court has already construed such statutes.

D. The Right to Waive a Jury Trial Is as Much a Constitutional Right as the Right to Demand a Jury Trial and the Court, Having Waived a Jury Trial in the Former Jeopardy Plea Is Bound to Waive It in the Trial in Chief.

Can the defendant waive a jury trial? We repeat that in this case the jury could not have considered anything except first degree murder with life imprisonment, or not guilty, and the Trial Court knew at the beginning of the trial that the evidence on the part of the District Attorney was and would be a charge of robbery in which a murder was allegedly committed, making this a mandatory first degree murder case. No other verdicts were possible and the Court was bound by this.

The Trial Court did not call a jury in the matter of the *plea of former jeopardy*, and this clearly required a jury since it was part of a murder case. The cases in Colorado require a jury in pleas of former jeopardy.

The Court cannot overrule a plea of former jeopardy because, from the facts within its own knowledge, the averments are true or untrue, but the issues *must be submitted to a jury*. *Dockstader* v. *People*, 43 C. 437, 97 P. 254; *Kinkle* v. *People*, 27 C. 459, 62 P. 197; *Eplen* v. *People*, 51 C. 596, 119 P. 1062.

The Court ruled there was no former jeopardy. Having thus waived a jury in a part of the case, how could the Court say that a jury was required in the principal trial?

If this is true then the ruling of the Court deprived Bobby Gallegos of a trial by jury in the plea of former jeopardy and thus he did not have equal protection of the law.

III

Conclusion

Having fully covered the points raised in the Answer Brief of the Respondent, it appears that Bobby Gallegos lost substantial constitutional rights. The United States Supreme Court is amply justified in considering the matter. The very arguments that are made in the answer brief conclusion bears out our position: for if the Supreme Court of Colorado feels the arguments made in behalf of the Petitioner before that court justify the Governor in commuting the sentence or giving a pardon, is not this an argument for direct reversal as a part of our judicial functions?

The only duty of all of us is to seek and render that elusive standard called justice. Public officers owe no duty except to follow the same broad precepts set forth so eloquently under the Constitution of the United States.

Respectfully submitted.

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Office-Supreme Court, U.S.
FILED
JUN 23 1962
JOHN F. DAVIS, CLERK

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Respondent.

EN BANC — JUDGMENT REVERSED

MR. JUSTICE DOUGLAS delivered the opinion of the Court

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

INTRODUCTION

The State of Colorado's position on this matter is so completely and forcefully outlined in the separate and presently dissenting opinion authored by Mr. Justice Clark that it would be an injustice to try to improve upon the wording found therein. Therefore, the major portions of this Petition for Rehearing will be formulated by quoting the most pertinent parts of that opinion in answer to certain propositions advanced in the majority opinion.

ARGUMENT

I. THIS COURT'S INNUENDO THAT PETITIONER'S EARLY CONFESSIONS IMMEDIATELY AFTER HIS ARREST WERE ACQUIRED "IN CALLOUS DISREGARD OF THIS BOY'S CONSTITUTIONAL RIGHTS" IS NOT SUPPORTED BY THE RELEVANT FACTS OR LAW.

It must be first noted that these confessions included "spontaneous oral admissions made by petitioner at the time of his arrest on January 1, as well as a detailed confession made the next day, all long before the formal confession was given five days later. * * *" "In regard to the confessions, the test of voluntariness as evidenced by the 'totality of the circumstances' leads the Court not to question them. Here there were no 'secret inquisitorial processes, or compulsion of any kind . . .' The Court's only criticism is that petitioner 'would have no way of knowing what the consequences of his confession were without advice as to his rights. . . .' The truth of the matter is that the singular circumstance pointed out by the Court has never been thought to render a confession inadmissible. *See Culombe v. Connecticut*, 367 U. S. 568, 577-602 (1961) (opinion of Mr. Justice Frankfurter)."

II. AN EXAMINATION OF THE "TOTALITY OF CIRCUMSTANCES" SURROUNDING THE TAKING OF THE FORMAL CONFESSION UPON WHICH THIS CONVICTION MAY HAVE RESTED DOES NOT SHOW THAT IT WAS OBTAINED IN VIOLATION OF DUE PROCESS.

"Petitioner freely admitted in testimony before the trial judge that he was not threatened or physically coerced in any way and that he was not intensively questioned. Moreover, prior to the formal confession he was told that he did not have to make a statement and warned of the possibility of a murder charge, as well as informed that he could have an attorney and his parents present..."

"Petitioner was never placed in solitary confinement. . . ."

"Nor was petitioner 'cut off' from contact with lawyers or adults and 'made accessible only to the police.' His mother made no effort to obtain an attorney although informed of the right to do so. And she was not prevented from seeing him but merely asked to comply with reasonable visiting regulations. . . . petitioner himself passed up the offer to confer with his parents and an attorney before making this confession.

"In support of the above factors indicating that the confession of January 7 was voluntary is the undeniable fact that petitioner admitted on January 1 his participation in the assault and confessed in detail thereto on January 2. * * * (It is difficult) to understand how one could conclude that the police found it expedient to coerce the

January 7 confession or that the events discussed by the Court rendered it involuntary when five days earlier a substantially identical confession was made in the absence of the 'coercive' events."

CONCLUSION

It seems regrettable "that without support from prior cases and on the basis of inference and conjecture not supported in the record the Court upsets this conviction."

CERTIFICATE

It is hereby certified that this petition is presented in good faith and not for the purpose of delay.

Respectfully submitted,

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